13097, are amended to add responsibility as follows:

1. Add § 1700.95, to read as follows:

§ 1700.95 Assistant Deputy Administrator.

The Assistant Deputy Administrator is designated by the Administrator to perform routine matters concurrently with the Deputy Administrator.

Effective date. This amendment is effective on March 5, 1973.

GEORGE K. BERNSTEIN,
Interstate Land Sales Administrator.

[FR Doc.73-4148 Filed 3-2-73;8:45 am]

Title 26—Internal Revenue

CHAPTER I—INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY

SUBCHAPTER A—INCOME TAX

[T.D. 7262]

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Disallowance of Interest on Certain Indebtedness Incurred by Corporatons To Acquire Stock or Assets of Another Corporation

By a notice of proposed rule making appearing in the FEDERAL REGISTER for May 4, 1972 (37 FR 9030), amendments of the Income Tax Regulations (26 CFR Part 1) were proposed in order to provide rules under section 279 enacted by the Tax Reform Act of 1969, relating to interest on indebtedness incurred by a corporation to acquire stock or assets of another corporation. After consideration of all such relevant matter as was presented by interested persons regarding the rules proposed, certain changes were made and the proposed amendments of the regulations subject to the changes indicated below are adopted by this document:

Section 279 was enacted to provide specific rules for determining whether interest paid on an obligation in the context of a corporate acquisition, is deductible. It provides that a corporation is not to be allowed an interest deduction with respect to certain types of indebtedness which it issues as consideration for the acquisition of stock in another corporation, or the acquisition of assets of another corporation.

Under the proposed regulations, obligations issued within 12 months prior or subsequent to an acquisition were deemed to be used to provide consideration for the acquisition. In addition, if at the time of the issuance of an obligation the issuing corporation anticipated an acquisition or at the time of an acquisition the issuing corporation foresaw the need to issue obligations for its future economic needs then the obligation was deemed to be used to provide consideration for the acquisition.

The final regulations pursuant to comments pointing out that the rule was beyond the scope of the statute, has abandoned the 12-month presumption. Instead, whether an obligation is issued to provide consideration will depend on the facts and circumstances. As an illustration of the facts and circumstances test, the final regulations couple the anticipation and the foreseeable tests that appeared in the proposed notice with a provision that an obligation will not be deemed issued to provide consideration unless it would not have been issued otherwise.

Where the corporation, which issued the obligation, is a member of an affiliated group, the affiliated group is to be treated as the issuing corporation. The final regulations are more explicit as to how affiliated groups are treated as the issuing corporation. Thus, with respect to the 5-percent stock ownership rule of section 279(d)(5), and in determining "control" for purposes of section 279, the holdings of each member of the affiliated group are added together. Also a retesting as provided in section 279(c) is to be done if any member of the affiliated group issues another obligation to acquire additional stock or assets of the acquired corporation.

The rule that appeared in the proposed regulations with respect to the exemption for acquisitions of certain foreign corporations has been modified. The provision that gross income from sources without the United States shall not include income which is effectively connected with a U.S. trade or business, has been eliminated. The final regulations adhere to the traditional rules of income from sources without the United States. Additionally, corporations whose gross income includes 50 percent or more of foreign personal holding company income are no longer excluded from the exemption applicable to foreign corporations.

The final regulations relieve corporations with an interest deduction of $5 million or less on obligations issued to provide consideration for an acquisition, of the reporting requirements that appeared in the proposed regulations. Since section 279 disallows an interest deduction only when the deduction is in excess of $5 million it was felt unnecessary to require a statement of taxpayers with an interest deduction of a lesser amount.

ADOPTION OF AMENDMENTS TO THE REGULATIONS

On May 4, 1972, a notice of proposed rule making was published in the FEDERAL REGISTER (37 FR 9030) to amend the regulations to provide rules under section 279 enacted by the Tax Reform Act of 1969 relating to interest on indebtedness incurred by a corporation to acquire stock or assets of another corporation. After consideration of all such relevant matter as was presented by interested persons regarding the rules proposed, the amendment of the regulations as proposed is hereby adopted, subject to the changes set forth below.

PARAGRAPH 1. Section 1.279-1 as set forth in the May 4, 1972, notice of proposed rule making, is amended by revising the first sentence therein. Such revised provision reads as set forth below.

PAR. 2. Paragraphs (a)(2), (b)(1), and (c) of § 1.279-2, as set forth in the May 4, 1972, notice of proposed rule making, are amended by revising the language immediately following subdivision (iv) of paragraph (a)(2), by revising the last sentence in subparagraph (1) of paragraph (b), by redesignating examples (1), (2), and (3) of paragraph (c) as examples (2), (3), and (4), respectively, and by inserting immediately before redesignated example (2) new example (1). Such revised and added provisions read, as set forth below.

PAR. 3. Paragraphs (b) (2), (3), (5) and (g)(3) of § 1.279-3, as set forth in the May 4, 1972, notice of proposed rule making, are amended by revising paragraphs (b) (2) and (3), by adding two sentences at the end of subdivision (i) of paragraph (b)(5), and by eliminating the last two sentences from paragraph (g)(3). Such revised and added provisions read, as set forth below.

PAR. 4. Paragraphs (b)(1) and (c)(2) of § 1.279-4, as set forth in the May 4, 1972, notice of proposed rule making, are amended by revising paragraph (b)(1) and by revising example (2) of paragraph (c)(2). Such revised provisions read, as set forth below.

PAR. 5. Paragraphs (b)(2), (d)(1), (e)(1), and (h) of § 1.279-5, as set forth in the May 4, 1972 notice of proposed rule making, are amended by adding two sentences at the end of subdivision (i) of paragraph (b)(2), by adding a sentence at the end of subdivision (ii) of paragraph (d)(1), by revising the penultimate sentence of that portion of paragraph (e)(1) that immediately follows subdivision (ii) and by revising paragraph (h). Such revised and added provisions read, as set forth below.

PAR. 6. Paragraph (a) of § 1.279-6, as set forth in the May 4, 1972 notice of proposed rule making, is amended by adding a sentence at the end thereof. Such revised provision reads, as set forth below.

(Sec. 7805, Internal Revenue Code of 1954, 68A Stat. 917; 26 U.S.C. 7805)

JOHNNIE M. WALTERS,
Commissioner of Internal Revenue.

Approved: February 26, 1973.

JOHN H. HALL,
Deputy Assistant Secretary of the Treasury.

The following new sections are added immediately after § 1.278-1:

§ 1.279 Statutory provisions; disallowance of interest on certain indebtedness incurred by corporation to acquire stock or assets of another corporation.

SEC. 279. *Interest on indebtedness incurred by corporation to acquire stock or assets of another corporation*—(a) *General rules.* No deduction shall be allowed for any interest paid or incurred by a corporation during the taxable year with respect to its corporate acquisition indebtedness to the extent that such interest exceeds—

(1) $5 million, reduced by

(2) The amount of interest paid or incurred by such corporation during such year on obligations (A) issued after December 31,

1967, to provide consideration for an acquisition described in paragraph (1) of subsection (b), but (B) which are not corporate acquisition indebtedness.

(b) *Corporate acquisition indebtedness.* For purposes of this section, the term "corporate acquisition indebtedness" means any obligation evidenced by a bond, debenture, note, or certificate or other evidence of indebtedness issued after October 9, 1969, by a corporation (hereinafter in this section referred to as "issuing corporation") if—

(1) Such obligation is issued to provide consideration for the acquisition of—

(A) Stock in another corporation (hereinafter in this section referred to as "acquired corporation"), or

(B) Assets of another corporation (hereinafter in this section referred to as "acquired corporation") pursuant to a plan under which at least two-thirds (in value) of all the assets (excluding money) used in trades and businesses carried on by such corporation are acquired,

(2) Such obligation is either—

(A) Subordinated to the claims of trade creditors of the issuing corporation generally, or

(B) Expressly subordinated in right of payment to the payment of any substantial amount of unsecured indebtedness, whether outstanding or subsequently issued, of the issuing corporation,

(3) The bond or other evidence of indebtedness is either—

(A) Convertible directly or indirectly into stock of the issuing corporation, or

(B) Part of an investment unit or other arrangement which includes, in addition to such bond or other evidence of indebtedness, an option to acquire, directly or indirectly, stock in the issuing corporation, and

(4) As of a day determined under subsection (c)(1), either—

(A) The ratio of debt to equity (as defined in subsection (c)(2)) of the issuing corporation exceeds 2 to 1, or

(B) The projected earnings (as defined in subsection (c)(3)) do not exceed three times the annual interest to be paid or incurred (determined under subsection (c)(4)).

(c) *Rules for application of subsection (b)(4).* For purposes of subsection (b)(4)—

(1) *Time of determination.* Determinations are to be made as of the last day of any taxable year of the issuing corporation in which it issues any obligation to provide consideration for an acquisition described in subsection (b)(1) of stock in, or assets of, the acquired corporation.

(2) *Ratio of debt to equity.* The term "ratio of debt to equity" means the ratio which the total indebtedness of the issuing corporation bears to the sum of its money and all its other assets (in an amount equal to their adjusted basis for determining gain) less such total indebtedness.

(3) *Projected earnings.*

(A) The term "projected earnings" means the "average annual earnings" (as defined in subparagraph (B)) of—

(i) The issuing corporation only, if clause (ii) does not apply, or

(ii) Both the issuing corporation and the acquired corporation, in any case where the issuing corporation has acquired control (as defined in section 368(c)), or has acquired substantially all of the properties, of the acquired corporation.

(B) The average annual earnings referred to in subparagraph (A) is, for any corporation, the amount of its earnings and profits for any 3-year period ending with the last day of a taxable year of the issuing corporation described in paragraph (1), computed without reduction for—

(i) Interest paid or incurred,

(ii) Depreciation or amortization allowed under this chapter,

(iii) Liability for tax under this chapter, and

(iv) Distributions to which section 301(c)(1) applies (other than such distributions from the acquired to the issuing corporation),

and reduced to an annual average for such 3-year period pursuant to regulations prescribed by the Secretary or his delegate. Such regulations shall include rules for cases where any corporation was not in existence for all of such 3-year period or such period includes only a portion of a taxable year of any corporation.

(4) *Annual interest to be paid or incurred.* The term "annual interest to be paid or incurred" means—

(A) If subparagraph (B) does not apply, the annual interest to be paid or incurred by the issuing corporation only, determined by reference to its total indebtedness outstanding, or

(B) If projected earnings are determined under clause (ii) of paragraph (3)(A), the annual interest to be paid or incurred by both the issuing corporation and the acquired corporation, determined by reference to their combined total indebtedness outstanding.

(5) *Special rules for banks and lending or finance companies.* With respect to any corporation which is a bank (as defined in section 581) or is primarily engaged in a lending or finance business—

(A) In determining under paragraph (2) the ratio of debt to equity of such corporation (or of the affiliated group of which such corporation is a member), the total indebtedness of such corporation (and the assets of such corporation) shall be reduced by an amount equal to the total indebtedness owed to such corporation which arises out of the banking business of such corporation, or out of the lending or finance business of such corporation, as the case may be;

(B) In determining under paragraph (4) the annual interest to be paid or incurred by such corporation (or by the issuing and acquired corporations referred to in paragraph (4)(B) or by the affiliated group of which such corporation is a member) the amount of such interest (determined without regard to this paragraph) shall be reduced by an amount which bears the same ratio to the amount of such interest as the amount of the reduction for the taxable year under subparagraph (A) bears to the total indebtedness of such corporation; and

(C) In determining under paragraph (3)(B) the average annual earnings, the amount of the earnings and profits for the 3-year period shall be reduced by the sum of the reductions under subparagraph (B) for such period.

For purposes of this paragraph, the term "lending or finance business" means a business of making loans or purchasing or discounting accounts receivable, notes, or installment obligations.

(d) *Taxable years to which applicable.* In applying this section—

(1) *First year of disallowance.* The deduction of interest on any obligation shall not be disallowed under subsection (a) before the first taxable year of the issuing corporation as of the last day of which the application of either subparagraph (A) or subparagraph (B) of subsection (b)(4) results in such obligation being corporate acquisition indebtedness.

(2) *General rule for succeeding years.* Except as provided in paragraphs (3), (4), and (5), if an obligation is determined to be corporate acquisition indebtedness as of the last day of any taxable year of the issuing corporation, it shall be corporate acquisition indebtedness for such taxable year and all subsequent taxable years.

(3) *Redetermination where control, etc., is acquired.* If an obligation is determined to be corporate acquisition indebtedness as of the close of a taxable year of the issuing corporation in which clause (i) of subsection (c)(3)(A) applied, but would not be corporate acquisition indebtedness if the determination were made as of the close of the first taxable year of such corporation thereafter in which clause (ii) of subsection (c)(3)(A) could apply, such obligation shall be considered not to be corporate acquisition indebtedness for such later taxable year and all taxable years thereafter.

(4) *Special 3-year rule.* If an obligation which has been determined to be corporate acquisition indebtedness for any taxable year would not be such indebtedness for each of any 3 consecutive taxable years thereafter if subsection (b)(4) were applied as of the close of each of such 3 years, then such obligation shall not be corporate acquisition indebtedness for all taxable years after such 3 consecutive taxable years.

(5) *Five-percent stock rule.* In the case of obligations issued to provide consideration for the acquisition of stock in another corporation, such obligations shall be corporate acquisition indebtedness for a taxable year only if at some time after October 9, 1969, and before the close of such year the issuing corporation owns 5 percent or more of the total combined voting power of all classes of stock entitled to vote of such other corporation.

(e) *Certain nontaxable transactions.* An acquisition of stock of a corporation of which the issuing corporation is in control (as defined in section 368(c)) in a transaction in which gain or loss is not recognized shall be deemed an acquisition described in paragraph (1) of subsection (b) only if immediately before such transaction (1) the acquired corporation was in existence, and (2) the issuing corporation was not in control (as defined in section 368(c)) of such corporation.

(f) *Exemption for certain acquisitions of foreign corporations.* For purposes of this section, the term "corporate acquisition indebtedness" does not include any indebtedness issued to any person to provide consideration for the acquisition of stock in, or assets of, any foreign corporation substantially all of the income of which, for the 3-year period ending with the date of such acquisition or for such part of such period as the foreign corporation was in existence, is from sources without the United States.

(g) *Affiliated groups.* In any case in which the issuing corporation is a member of an affiliated group, the application of this section shall be determined, pursuant to regulations prescribed by the Secretary or his delegate, by treating all of the members of the affiliated group in the aggregate as the issuing corporation, except that the ratio of debt to equity of, projected earnings of, and annual interest to be paid or incurred by any corporation (other than the issuing corporation determined without regard to this subsection) shall be included in the determinations required under subparagraphs (A) and (B) of subsection (b)(4) as of any day only if such corporation is a member of the affiliated group on such day, and, in determining projected earnings of such corporation under subsection (c)(3), there shall be taken into account only the earnings and profits of such corporation for the period during which it was a member of the affiliated group. For purposes of the preceding sentence, the term "affiliated group" has the meaning assigned to such term by section 1504(a), except that all corporations other than the acquired corporation shall be treated as includable corporations (without any exclusion under section 1504(b)) and

the acquired corporation shall not be treated as an includable corporation.

(h) *Changes in obligation.* For purposes of this section—

(1) Any extension, renewal, or refinancing of an obligation evidencing a preexisting indebtedness shall not be deemed to be the issuance of a new obligation.

(2) Any obligation which is corporate acquisition indebtedness of the issuing corporation is also corporate acquisition indebtedness of any corporation which becomes liable for such obligation as guarantor, endorser, or indemnitor or which assumes liability for such obligation in any transaction.

(i) *Certain obligations issued after October 9, 1969.* For purposes of this section, an obligation shall not be corporate acquisition indebtedness if issued after October 9, 1969, to provide consideration for the acquisition of—

(1) Stock or assets pursuant to a binding written contract which was in effect on October 9, 1969, and at all times thereafter before such acquisition, or

(2) Stock in any corporation where the issuing corporation, on October 9, 1969, and at all times thereafter before such acquisition, owned at least 50 percent of the total combined voting power of all classes of stock entitled to vote of the acquired corporation.

Paragraph (2) shall cease to apply when (at any time on or after October 9, 1969) the issuing corporation has acquired control (as defined in section 368(c)) of the acquired corporation.

(j) *Effect on other provisions.* No inference shall be drawn from any provision in this section that any instrument designated as a bond, debenture, note, or certificate or other evidence of indebtedness by its issuer represents an obligation or indebtedness of such issuer in applying any other provision of this title.

[Sec. 279 as added by section 411(a), Tax Reform Act of 1969 (83 Stat. 604)]

§ 1.279–1 General rule; purpose.

An obligation issued to provide a consideration directly or indirectly for a corporate acquisition, although constituting a debt under section 385, may have characteristics which make it more appropriate that the participation in the corporation which the obligation represents be treated for purposes of the deduction of interest as if it were a stockholder interest rather than a creditors interest. To deal with such cases, section 279 imposes certain limitations on the deductibility of interest paid or incurred on obligations which have certain equity characteristics and are classified as corporate acquisition indebtedness. Generally, section 279 provides that no deduction will be allowed for any interest paid or incurred by a corporation during the taxable year with respect to its corporate acquisition indebtedness to the extent such interest exceeds $5 million. However, the $5 million limitation is reduced by the amount of interest paid or incurred on obligations issued under the circumstances described in section 279(a)(2) but which are not corporate acquisition indebtedness. Section 279(b) provides that an obligation will be corporate acquisition indebtedness if it was issued under certain circumstances and meets the four tests enumerated therein. Although an obligation may satisfy the conditions referred to in the preceding sentence, it may still escape classification as corporate acquisition indebtedness if the conditions as described in sections 279(d)(3), (4), and (5), 279(f), or 279(i) are present. However, no inference should be drawn from the rules of section 279 as to whether a particular instrument labeled a bond, debenture, note, or other evidence of indebtedness is in fact a debt. Before the determination as to whether the deduction for payments pursuant to an obligation as described in this section is to be disallowed, the obligation must first qualify as debt in accordance with section 385. If the obligation is not debt under section 385, it will be unnecessary to apply section 279 to any payments pursuant to such obligation.

§ 1.279–2 Amount of disallowance of interest on corporate acquisition indebtedness.

(a) *In general.* Under section 279(a), no deduction is allowed for any interest paid or incurred by a corporation during the taxable year with respect to its corporate acquisition indebtedness to the extent that such interest exceeds—

(1) $5 million, reduced by

(2) The amount of interest paid or incurred by such corporation during such year on any obligation issued after December 31, 1967, to provide consideration directly or indirectly for an acquisition described in section 279(b)(1) but which is not corporate acquisition indebtedness. Such an obligation is not corporate acquisition indebtedness if it—

(i) Was issued prior to October 10, 1969, or

(ii) Was issued after October 9, 1969, but does not meet any one or more of the tests of section 279(b) (2), (3), or (4), or

(iii) Was originally deemed to be corporate acquisition indebtedness but is no longer so treated by virtue of the application of paragraphs (3) or (4) of section 279(d), or

(iv) Is specifically excluded from treatment as corporate acquisition indebtedness by virtue of sections 279(d)(5), (f), or (i).

The computation of the amount by which the $5 million limitation described in this paragraph is to be reduced with respect to any taxable year is to be made as of the last day of the taxable year in which an acquisition described in section 279(b)(1) occurs. In no case shall the $5 million limitation be reduced below zero.

(b) *Certain terms defined.* When used in section 279 and the regulations thereunder—

(1) The term "issued" includes the giving of a note or other evidence of indebtedness to a bank or other lender as well as an issuance of a bond or debenture. In the case of obligations which are registered with the Securities and Exchange Commission, the date of issue is the date on which the issue is first offered to the public. In the case of obligations which are not so registered, the date of issue is the date on which the obligation is sold to the first purchaser.

(2) The term "interest" includes both stated interest and unstated interest (such as original issue discount as defined in paragraph (a)(1) of § 1.163-4 and amounts treated as interest under section 483).

(3) The term "money" means cash and its equivalent.

(4) The term "control" shall have the meaning assigned to such term by section 368(c).

(5) The term "affiliated group" shall have the meaning assigned to such term by section 1504(a), except that all corporations other than the acquired corporation shall be treated as includible corporations (without any exclusion under section 1504(b)) and the acquired corporation shall not be treated as an includible corporation. This definition shall apply whether or not some or all of the members of the affiliated group file a consolidated return.

(c) *Examples.* The provisions of paragraph (a) of this section may be illustrated by the following examples:

Example (1). On March 4, 1973, X Corporation, a calendar year taxpayer, issues an obligation which satisfies the test of section 279(b)(1) but fails to satisfy either of the tests of section 279(b) (2) or (3). Since at least one of the tests of section 279(b) is not satisfied the obligation is not corporate acquisition indebtedness. However, since the test of section 279(b)(1) is satisfied, the interest on the obligation will reduce the $5 million limitation provided by section 279(a)(1).

Example (2). On January 1, 1969, X Corporation, a calendar year taxpayer, issues an obligation, which satisfies all the tests of section 279(b), requiring it to pay $3.5 million of interest each year. Since the obligation was issued before October 10, 1969, the obligation cannot be corporate acquisition indebtedness, and a deduction for the $3.5 million of interest attributable to such obligation is not subject to disallowance under section 279(a). However, since the obligation was issued after December 31, 1967, in an acquisition described in section 279(b)(1), under section 279(a)(2) the $3.5 million of interest attributable to such obligation reduces the $5 million limitation provided by section 279(a)(1) to $1.5 million.

Example (3). Assume the same facts as in example (2). Assume further that on January 1, 1970, X Corporation issues more obligations which are classified as corporate acquisition indebtedness and which require X Corporation to pay $4 million of interest each year. For 1970 the amount of interest paid or accrued on corporate acquisition indebtedness, which may be deducted is $1.5 million ($5 million maximum provided by section 279(a)(1) less $3.5 million, the reduction required under section 279(a)(2)). Thus, $2.5 million of the $4 million interest incurred on a corporate acquisition indebtedness is subject to disallowance under section 279(a) for the taxable year 1970.

Example (4). Assume the same facts as in example (3). Assume further that on the last day of each of the taxable years 1971, 1972, and 1973 of X Corporation neither of the conditions described in section 279(b)(4) was present.

Under these circumstances, such obligations for all taxable years after 1973 are not corporate acquisition indebtedness under section 279(d)(4). Therefore, the $2.5 million of interest previously not deductible is now deductible for all taxable years after 1973. Although such obligations are no longer

treated as corporate acquisition indebtedness, the interest attributable thereto must be applied in further reduction of the $5 million limitation. The $5 million limitation of section 279(a)(1) is therefore reduced to zero. While the limitation is at the zero level any interest paid or incurred on corporate acquisition indebtedness will be disallowed.

§ 1.279–3 Corporate acquisition indebtedness.

(a) *Corporate acquisition indebtedness.* For purposes of section 279, the term "corporate acquisition indebtedness" means any obligation evidenced by a bond, debenture, note, or certificate or other evidence of indebtedness issued after October 9, 1969, by a corporation (referred to in section 279 and the regulations thereunder as "issuing corporation") if the obligation is issued to provide consideration directly or indirectly for the acquisition of stock in, or certain assets of, another corporation (as described in paragraph (b) of this § 1.279–3), is "subordinated" (as described in paragraph (c) of this § 1.279–3), is "convertible" (as described in paragraph (d) of this § 1.279–3), and satisfies either the ratio of debt to equity test (as described in paragraph (f) of § 1.279–5) or the projected earnings test (as described in paragraph (d) of § 1.279–5).

(b) *Acquisition of stock or assets.* (1) Section 279(b)(1) describes one of the tests to be satisfied if an obligation is to be classified as corporate acquisition indebtedness. Under section 279(b)(1), the obligation must be issued to provide consideration directly or indirectly for the acquisition of—

(i) Stock (whether voting or nonvoting) in another corporation (referred to in section 279 and the regulations thereunder as "acquired corporation"), or

(ii) Assets of another corporation (referred to in section 279 and the regulations thereunder as "acquired corporation") pursuant to a plan under which at least two-thirds (in value) of all the assets (excluding money) used in trades or businesses carried on by such corporation are acquired.

The fact that the corporation that issues the obligation is not the same corporation that acquires the acquired corporation does not prevent the application of section 279. For example, if X Corporation acquires all the stock of Y Corporation through the utilization of an obligation of Z Corporation, a wholly owned subsidiary of X Corporation, this section will apply.

(2) *Direct or indirect consideration.* Obligations are issued to provide direct consideration for an acquisition within the meaning of section 279(b)(1) where the obligations are issued to the shareholders of an acquired corporation in exchange for stock in such acquired corporation or where the obligations are issued to the acquired corporation in exchange for its assets. The application of the provisions of this subsection relating to indirect consideration for an acquisition of stock or assets depends upon the facts and circumstances surrounding the acquisition and the issuance of the obligations. Obligations are issued to provide indirect consideration for an acquisition of stock or assets within the meaning of section 279(b)(1) where (i) at the time of the issuance of the obligations the issuing corporation anticipated the acquisition of such stock or assets and the obligations would not have been issued if the issuing corporation had not so anticipated such acquisition, or where (ii) at the time of the acquisition the issuing corporation foresaw or reasonably should have foreseen that it would be required to issue obligations, which it would not have otherwise been required to issue if the acquisition had not occurred, in order to meet its future economic needs.

(3) *Stock acquisition.* (i) For purposes of section 279, an acquisition in which the issuing corporation issues an obligation to provide consideration directly or indirectly for the acquisition of stock in the acquired corporation shall be treated as a stock acquisition within the meaning of section 279(b)(1)(A). Where the stock of one corporation is acquired from another corporation and such stock constitutes at least two-thirds (in value) of all the assets (excluding money) of the latter corporation, such acquisition shall be deemed an asset acquisition as described in section 279(b)(1)(B) and subparagraph (4) of this section. If the issuing corporation acquires less than two-thirds (in value) of all the assets (excluding money) used in trades or businesses carried on by the acquired corporation within the meaning of section 279(b)(1)(B) and subparagraph (4) of this paragraph and such assets include stock of another corporation, the acquisition of such stock is a stock acquisition within the meaning of section 279(b)(1)(A) and of this subparagraph. In such a case the amount of the obligation which is characterized as corporate acquisition indebtedness shall bear the same relationship to the total amount of the obligation issued as the fair market value of the stock acquired bears to the total of the fair market value of the assets acquired and stock acquired, as of the date of acquisition. For rules with respect to acquisitions of stock, where the total amount of stock of the acquired corporation held by the issuing corporation never exceeded 5 percent of the total combined voting power of all classes of stock of the acquired corporation entitled to vote, see § 1.279–4(b)(1).

(ii) If the issuing corporation acquired stock of an acquired corporation in an acquisition described in section 279(b)(1)(A), and liquidated the acquired corporation under section 334(b)(2) and the regulations thereunder before the last day of the taxable year in which such stock acquisition is made, such obligation issued to provide consideration directly or indirectly to acquire such stock of the acquired corporation shall be considered as issued in an acquisition described in section 279(b)(1)(B).

(4) *Asset acquisition.* (i) For purposes of section 279, an acquisition in which the issuing corporation issues an obligation to provide consideration directly or indirectly for the acquisition of assets of an acquired corporation pursuant to a plan under which at least two-thirds of the gross value of all the assets (excluding money) used in trades and businesses carried on by such acquired corporation are acquired shall be treated as an asset acquisition within the meaning of section 279(b)(1)(B). For purposes of section 279(b)(1)(B), the gross value of any acquired asset shall be its fair market value as of the day of its acquisition. In determining the fair market value of an asset, no reduction shall be made for any liabilities, mortgages, liens, or other encumbrances to which the asset or any part thereof may be subjected. For purposes of this subparagraph, an asset which has been actually used in the trades and businesses of a corporation but which is temporarily not being used in such trades and businesses shall be treated as if it is being used in such manner. For purposes of this paragraph, the day of acquisition will be determined by reference to the facts and circumstances surrounding the transaction.

(ii) For purposes of the two-thirds test described in section 279(b)(1)(B), the stock of any corporation which is controlled by the acquired corporation shall be considered as an asset used in the trades and businesses of such acquired corporation.

(5) *Certain nontaxable transactions.* (i) Under section 279(e), an acquisition of stock of a corporation of which the issuing corporation is in control in a transaction in which gain or loss is not recognized shall be deemed an acquisition described in section 279(b)(1)(A) only if immediately before such transaction the acquired corporation was in existence, and the issuing corporation was not in control of such corporation. If the issuing corporation is a member of an affiliated group, then in accordance with section 279(g), the affiliated group shall be treated as the issuing corporation. Thus, any stock of the acquired corporation, owned by members of the affiliated group, shall be aggregated in determining whether the issuing corporation was in control of the acquired corporation.

(ii) The $5 million limitation provided by section 279(a)(1) is not reduced by the interest on an obligation issued in a transaction which, under section 279(e), is deemed not to be an acquisition described in section 279(b)(1).

(iii) The provisions of this subparagraph may be illustrated by the following examples:

Example (1). On January 1, 1973, W Corporation, a calendar year taxpayer, issues to the public 10,000 10 year convertible bonds each with a principal of $1,000 for $9 million. On June 6, 1973, W Corporation transfers the $9 million proceeds of such bond issue to X Corporation in exchange for X Corporation's common stock in a transaction that satisfies the provisions of section 351(a). On December 31, 1973, W Corporation's ratio of debt to equity is 1½ to 1 and its project earnings exceed three times the annual interest to be paid or incurred. Immediately prior

to the transaction between the two corporations W Corporation owned no stock in X Corporation which had been in existence for several years. However, immediately after this transaction W Corporation is in control of X Corporation. Since X Corporation, the acquired corporation, was in existence and W Corporation, the issuing corporation, was not in control of X Corporation immediately before the section 351 transaction (a transaction in which gain or loss is not recognized) and since W Corporation is now in control of X Corporation, the acquisition of X Corporation's common stock by W Corporation is not protected from treatment as an acquisition described in section 279(b)(1)(A). However, the obligation will not be deemed to be corporate acquisition indebtedness since the test of section 279(b)(4) is not met. The interest on the obligation will reduce the $5 million limitation of section 279(a).

Example (2). Assume the facts are the same as described in example (1), except that X Corporation was not in existence prior to June 6, 1973, but rather is newly created by W Corporation on such date. Since X Corporation, the acquired corporation, was not in existence before June 6, 1973, the date on which W Corporation, the issuing corporation, acquired control of X Corporation in a transaction on which gain or loss is not recognized, the acquisition is not deemed to be an acquisition described in section 279(b)(1)(A). Thus, under the provisions of subdivision (ii) of this subparagraph, the $5 million limitation provided by section 279(a)(1) will not be reduced by the yearly interest incurred on the convertible bonds issued by W Corporation.

Example (3). Assume that the facts are the same as described in example (1), except that W Corporation was in control of X Corporation immediately before the transaction. Since W Corporation was in control of X Corporation immediately before the section 351(a) transaction and is in control of X Corporation after such transaction, the result will be the same as in example (2).

(c) *Subordinated obligation*—(1) *In general.* An obligation which is issued to provide consideration for an acquisition described in secton 279(b)(1) is subordinated within the meaning of section 279(b)(2) if it is either—

(i) Subordinated to the claims of trade creditors of the issuing corporation generally, or

(ii) Expressly subordinated in right of payment to the payment of any substantial amount of unsecured indebtedness, whether outstanding or subsequently issued, of the issuing corporation,

irrespective of whether such subordination relates to payment of interest, or principal, or both. In applying section 279(b)(2) and this paragraph in any case where the issuing corporation is a member of an affiliated group of corporations, the affiliated group shall be treated as the issuing corporation.

(2) *Expressly subordinated obligation.* In applying subparagraph (1)(ii) of this paragraph, an obligation is considered expressly subordinated whether the terms of the subordination are provided in the evidence of indebtedness itself, or in another agreement between the parties to such obligation. An obligation shall be considered to be expressly subordinated within the meaning of subparagraph (1)(ii) of this paragraph if such obligation by its terms can become subordinated in right of payment to the payment of any substantial amount of unsecured indebtedness which is outstanding or which may be issued subsequently. However, an obligation shall not be considered expressly subordinated if such subordination occurs solely by operation of law, such as in the case of bankruptcy laws. For purposes of this paragraph, the term "substantial amount of unsecured indebtedness" means an amount of unsecured indebtedness equal to 5 percent or more of the face amount of the obligations issued within the meaning of section 279(b)(1).

(d) *Convertible obligation.* An obligation which is issued to provide consideration directly or indirectly for an acquisition described in section 279(b)(1) is convertible within the meaning of section 279(b)(3) if it is either—

(1) Convertible directly or indirectly into stock of the issuing corporation, or

(2) Part of an investment unit or other arrangement which includes, in addition to such bond or other evidence of indebtedness, an option to acquire directly or indirectly stock in the issuing corporation. Stock warrants or convertible preferred stock included as part of an investment unit constitute options within the meaning of the preceding sentence. Indebtedness is indirectly convertible if the conversion feature gives the holder the right to convert into another bond of the issuing corporation which is then convertible into the stock of the issuing corporation.

In any case where the corporation which in fact issues an obligation to provide consideration for an acquisition described in section 279(b)(1) is a member of an affiliated group, the provisions of section 279(b)(3) and this paragraph are deemed satisfied if the stock into which either the obligation or option which is part of an investment unit or other arrangement is convertible, directly or indirectly, is stock of any member of the affiliated group.

(e) *Ratio of debt to equity and projected earnings test.* For rules with respect to the application of section 279(b)(4) (relating to the ratio of debt to equity and the ratio of projected earnings to annual interest to be paid or incurred), see paragraphs (d), (e), and (f) of § 1.279-5.

(f) *Certain obligations issued after October 9, 1969*—(1) *In general.* Under section 279(i), an obligation shall not be corporate acquisition indebtedness if such obligation is issued after October 9, 1969, to provide consideration for the acquisition of—

(i) Stock or assets pursuant to a binding written contract which was in effect on October 9, 1969, and at all times thereafter before such acquisition, or

(ii) Stock in any corporation where the issuing corporation, on October 9, 1969, and at all times thereafter before such acquisition, owned at least 50 percent of the total combined voting power of all classes of stock entitled to vote of the acquired corporation.

Subdivision (ii) of this subparagraph shall cease to apply when (at any time on or after October 9, 1969) the issuing corporation has acquired control of the acquired corporation. The interest attributable to any obligation which satisfies the conditions stated in the first sentence of this subparagraph shall reduce the $5 million limitation of section 279(a)(1).

(2) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

Example (1). On September 5, 1969, M Corporation, a calendar year taxpayer, entered into a binding written contract with N Corporation to purchase 20 percent of the voting stock of N Corporation. The contract was in effect on October 9, 1969, and at all times thereafter before the acquisition of the stock on January 1, 1970. Pursuant to such contract M Corporation issued on January 1, 1970, to N Corporation an obligation which satisfies the tests of section 279(b) requiring it to pay $1 million of interest each year. However, under the provisions of subparagraph (1)(i) of this paragraph, such obligation is not corporate acquisition indebtedness since it was issued to provide consideration for the acquisition of stock pursuant to a binding written contract which was in effect on October 9, 1969, and at all times thereafter before such acquisition. The $1 million of yearly interest on the obligation reduces the $5 million limitation provided for in section 279(a)(1) to $4 million since such interest is attributable to an obligation which was issued to provide consideration for the acquisition of stock in an acquired corporation.

Example (2). On October 9, 1969, O Corporation, a calendar year taxpayer, owned 50 percent of the total combined voting power of all classes of stock entitled to vote of P Corporation. P Corporation has no other class of stock. On January 1, 1970, while still owning such voting stock O Corporation issued to the shareholders of P Corporation to provide consideration for an additional 40 percent of P Corporation's voting stock an obligation which satisfied the tests of section 279(b) requiring it to pay $4 million of interest each year. Hence, O Corporation acquired control of P Corporation, and the provisions of subparagraph (1)(ii) of this paragraph ceased to apply to O Corporation. Thus, 75 percent of the obligation issued by O Corporation to provide consideration for the stock of P Corporation is not corporate acquisition indebtedness (that is, of the 40 percent of the voting stock of P Corporation which was acquired, only 30 percent was needed to give O Corporation control). Since 25 percent of the obligation is corporate acquisition indebtedness, $1 million of interest attributable to such obligation is subject to disallowance under section 279(a) for the taxable year 1970. The remaining $3 million of interest attributable to the obligation will reduce the $5 million limitation provided by in section 279(a)(1).

(g) *Exemptions for certain acquisitions of foreign corporations*—(1) *In general.* Under section 279(f), the term "corporate acquisition indebtedness" does not include any indebtedness issued to any person to provide consideration directly or indirectly for the acquisition

of stock in, or assets of, any foreign corporation substantially all the income of which, for the 3-year period ending with the date of such acquisition or for such part of such period as the foreign corporation was in existence, is from sources without the United States. The interest attributable to any obligation excluded from treatment as corporate acquisition indebtednes by reason of this paragraph shall reduce the $5 million limitation of 279(a)(1).

(2) *Foreign corporation.* For purposes of this paragraph, the term "foreign corporation" shall have the same meaning as in section 7701(a)(5).

(3) *Income from sources without the United States.* For purposes of this paragraph, the term "income from sources without the United States" shall be determined in accordance with sections 862 and 863. If more than 80 percent of a foreign corporation's gross income is derived from sources without the United States, such corporation shall be considered to be deriving substantially all of its income from sources without the United States.

§ 1.279–4 Special rules.

(a) *Special 3-year rule.* Under section 279(d)(4), if an obligation which has been deemed to be corporate acquisition indebtedness for any taxable year would not be such indebtedness for each of any 3 consecutive taxable years thereafter if the ratio of debt to equity and the ratio of projected earnings to annual interest to be paid or incurred of section 279(b)(4) were rpplied as of the close of each of such 3 years, then such obligation shall not be corporate acquisition indebtedness for any taxable years after such 3 consecutive taxable years. The test prescribed by section 279(b)(4) shall be applied as of the close of any taxable year whether or not the issuing corporation issues any obligation to provide consideration for an acquisition described in section 279(b)(1) in such taxable year. Thus, for example, if a corporation, reporting income on a calendar year basis, has an obligation outstanding as of December 31, 1975, which was classified as a corporate acquisition indebtedness as of the close of 1972 and such obligation would not have been classified as corporate acquisition indebtedness as of the close of 1973, 1974, and 1975 because neither of the conditions of section 279(b)(4) were present as of such dates, then such obligation shall not be corporate acquisition indebtedness for 1976 and all taxable years thereafter. Such obligation shall not be reclassified as corporate acquisition indebtedness in any taxable year following 1975, even if the issuing corporation issues more obligations (whether or not found to be corporate acquisition indebtedness) in such later years to provide consideration for the acquisition of additional stock in, or assets of, the same acquired corporation with respect to which the original obligation was issued. The interest attributable to such obligation shall reduce the $5 million limitation provided by section 279(a)(1) for 1976 and all taxable years thereafter.

(b) *Five percent stock rule*—(1) *In general.* Under section 279(d)(5), if an obligation issued to provide consideration for an acquisition of stock in another corporation meets the tests of section 279(b), such obligation shall be corporate acquisition indebtedness for a taxable year only if at sometime after October 9, 1969, and before the close of such year the issuing corporation owns or has owned 5 percent or more of the total combined voting power of all classes of stock entitled to vote in the acquired corporation. If the issuing corportation is a member of an affiliated group, then in accordance with section 279(g) the affiliated group shall be treated as the issuing corporation. Thus, any stock of the acquired corporation owned by members of the affiliated group shall be aggregated to determine if the percentage limitation provided by this subparagraph is exceeded. Once an obligation is deemed to be corporate acquisition indebtedness for all taxable years thereafter unless the provisions of section 279(d)(3) or (4) apply, notwithstanding the fact that the issuing corporation owns less than 5 percent of the combined voting power of all classes of stock entitled to vote of the acquired corporation in any or all taxable years thereafter.

(2) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

Example (1). Corporation Y uses the calendar year as its taxable year and has only one class of stock outstanding. On June 1, 1972, X Corporation which is also a calendar year taxpayer and which has never been a shareholder of Y Corporation acquires from the shareholders of Y Corporation 4 percent of the stock of Y Corporation in exchange for obligations which satisfy the conditions of section 279(b). At no time during 1972 does X Corporation own 5 percent or more of the stock of Y Corporation. Accordingly, under the provisions of subparagraph (1) of this paragraph, for 1972 the obligations issued by X Corporation to provide consideration for the acquisition of Y Cerporation's stock do not constitute corporate acquisition indebtedness.

Example (2). Assume the same facts as in example (1). Assume further that on February 24, 1973, X Corporation acquires from the shareholders of Y Corporation an additional 7 percent of the stock of Y Corporation in exchange for obligations which satisfy all of the tests of section 279(b). On December 28, 1973, X Corporation sells all of its stock in Y Corporation. For 1973, the obligations issued by X Corporation in 1972 and in 1973 constitute corporate acquisition indebtedness since X Corporation at some time after October 9, 1969, and before the close of 1973 bwned 5 percent or more of the voting stock of Y Corporation. Furthermore, such obligations shall be corporate acquisition indebtedness for all taxable years thereafter unless the special provisions of section 279(d)(3) or (4) could apply.

(c) *Changes in obligation*—(1) *In general.* Under section 279(h), for purposes of section 279—

(i) Any extension, renewal, or refinancing of an obligation evidencing a preexisting indebtedness shall not be deemed to be the issuance of a new obligation, and

(ii) Any obligation which is corporate acquisition indebtedness of the issuing corporation is also corporate acquisition indebtedness of any corporation which in any transaction or by operation of law assumes liability for such obligation or becomes liable for such obligation as guarantor, endorser, or indemnitor.

(2) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

Example (1). On January 1, 1971, X Corporation, which files its return on the basis of a calendar year, issues an obligation, which satisfies the tests of section 279(b), and is deemed to be corporate acquisition indebtedness. On January 1, 1973, an agreement is concluded between X Corporation and the holder of the obligation whereby the maturity date of such obligation is extended until December 31, 1979. Under the provisions of subparagraph (1)(i) of this paragraph such extended obligation is not deemed to be a new obligation, and still constitutes corporate acquisition indebtedness.

Example (2). On June 12, 1971, X Corporation, a calendar year taxpayer, issued convertible and subordinated obligations to acquire the stock of Z Corporation. The obligations were deemed corporate acquisition indebtedness on December 31, 1971. On March 4, 1973, X Corporation and Y Corporation consolidated to form XY Corporation in accordance with State law. Corporation XY is liable for the obligations issued by X Corporation by operation of law and the obligations continue to be corporate acquisition indebtedness. In 1975 XY Corporation exchanges its own nonconvertible obligations for the obligations X Corporation issued. The obligations of XY Corporation issued in exchange for those of X Corporation will be deemed to be corporate acquisition indebtedness.

§ 1.279–5 Rules for application of section 279(b).

(a) *Taxable years to which applicable*—(1) *First year of disallowance.* Under section 279(d)(1), the deduction of interest on any obligation shall not be disallowed under section 279(a) before the first taxable year of the issuing corporation as of the last day of which the application of either section 279(b)(4)(A) or (B) results in such obligation being classified as corporate acquisition indebtedness. See section 279(c)(1) and paragraph (b)(2) of this section for the time when an obligation is subjected to the test of section 279(b)(4).

(2) *General rule for succeeding years.* Under section 279(d)(2), except as provided in paragraphs (3), (4), and (5) of section 279(d), if an obligation is determined to be corporate acquisition indebtedness as of the last day of any taxable year of the issuing corporation, such obligation shall be corporate acquisition indebtedness for such taxable year and all subsequent taxable years.

(b) *Time of determination*—(1) *In general.* The determination of whether an obligation meets the conditions of section 279(b)(1), (2), and (3) shall be made as of the day on which the obligation is issued.

(2) *Ratio of debt to equity, projected earnings, and annual interest to be paid or incurred.* (i) Under section 279(c)(1), the determination of whether an obligation meets the conditions of

section 279(b)(4) is first to be made as of the last day of the taxable year of the issuing corporation in which it issues the obligation to provide consideration directly or indirectly for an acquisition described in section 279(b)(1) of stock in, or assets of, the acquired corporation. An obligation which is not corporate acquisition indebtedness only because it does not satisfy the test of section 279(b)(4) in the taxable year of the issuing corporation in which the obligation is issued for stock in, or assets of, the acquired corporation may be subjected to the test of section 279(b)(4) again. A retesting will occur in any subsequent taxable year of the issuing corporation in which the issuing corporation issues any obligation to provide consideraton directly or indirectly for an acquisition described in section 279(b)(1) with respect to the same acquired corporation, irrespective of whether such subsequent obligation is itself classified as corporate acquisition indebtedness. If the issuing corporation is a member of an affiliated group, then in accordance with section 279(g) the affiliated group shall be treated as the issuing corporation. Thus, if any member of the affiliated group issues an obligation to acquire additional stock in, or assets of, the acquired corporation, this paragraph shall apply.

(ii) For purposes of section 279(b)(4) and this paragraph, in any case where the issuing corporation is a member of an affiliated group (see section 279(g) and § 1.279-6 for rules regarding application of section 279 to certain affiliated groups) which does not file a consolidated return and all the members of which do not have the same taxable year, determinations with respect to the ratio of debt to equity of, and projected earnings of, and annual interest to be paid or incurred by, any member of the affiliated group shall be made as of the last day of the taxable year of the corporation which in fact issues the obligation to provide consideration for an acquisition described in section 279(b)(1).

(3) *Redetermination where control or substantially all the properties have been acquired.* Under section 279(d)(3), if an obligation is determined to be corporate acquisition indebtedness as of the close of a taxable year of the issuing corporation in which section 279(c)(3)(A)(i) (relating to the projected earnings of the issuing corporation only) applied, but would not be corporate acquisition indebtedness if the determination were made as of the close of the first taxable year of such corporation thereafter in which section 279(c)(3)(A)(ii) (relating to the projected earnings of both the issuing corporation and the acquired corporation) could apply, such obligation shall be considered not to be corporate acquisition indebtedness for such later taxable year and all taxable years thereafter. Where an obligation ceases to be corporate acquisition indebtedness as a result of the application of this paragraph, the interest on such obligation shall not be disallowed under section 279(a) as a deduction for the taxable year in which the obligation ceases to be corporate acquisition indebtedness and all taxable years thereafter. However, under section 279(a)(2) the interest paid or incurred on such obligation which is allowed as a deduction will reduce the $5 million limitation provided by section 279(a)(1).

(4) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

Example (1). In 1971, X Corporation, which files its Federal income tax return on the basis of a calendar year, issues its obligations to provide consideration for the acquisition of 15 percent of the voting stock of both Y Corporation and Z Corporation. Y Corporation and Z Corporation each have only one class of stock. When issued, such obligations satisfied the tests prescribed in section 279(b)(1), (2), and (3) and would have constituted corporate acquisition indebtedness but for the test prescribed in section 279(b)(4). On December 31, 1971, the application of section 279(b)(4) results in X Corporation's obligations issued in 1971 not being treated as corporate acquisition indebtedness for that year.

Example (2). Assume the same facts as in example (1), except that in 1972, X Corporation issues more obligations which come within the tests of section 279(b)(1), (2), and (3) to acquire an additional 10 percent of the voting stock of Y Corporation. No stock of Z Corporation is acquired after 1971. The application of section 279(b)(4)(B) (relating to the projected earnings of X Corporation) as of the end of 1972 results in the obligations issued in 1972 to provide consideration for the acquisition of the stock of Y Corporation being treated as corporate acquisition indebtedness. Since X Corporation during 1972 did issue obligations to acquire more stock of Y Corporation, under the provisions of section 279(c)(1) and subparagraph (2) of this paragraph the obligations issued by X Corporation in 1971 to acquire stock in Y Corporation are again tested to determine whether the test of section 279(b)(4) with respect to such obligations is satisfied for 1972. Thus, since such obligations issued by X Corporation to acquire Y Corporation's stock in 1971 previously came within the provisions of section 279(b)(1), (2), and (3) and the projected earnings test of section 279(b)(4)(B) is satisfied for 1972, all of such obligations are to be deemed to constitute corporate acquisition indebtedness for 1972 and subsequent taxable years. The obligations issued in 1971 to acquire stock in Z Corporation continue not to constitute corporate acquisition indebtedness.

Example (3). Assume the same facts as in examples (1) and (2). In 1973, X Corporation issues more obligations which come within the tests of section 279(b)(1), (2), and (3) to acquire more stock (but not control) in Y Corporation. On December 31, 1973, it is determined with respect to X Corporation that neither of the conditions described in section 279(b)(4) are present. Thus, the obligations issued in 1973 do not constitute corporate acquisition indebtedness. However, the obligations issued in 1971 and 1972 by X Corporation to acquire stock in Y Corporation continue to be treated as corporate acquisition indebtedness.

Example (4). Assume the same facts as in example (3), except that X Corporation acquires control of Y Corporation in 1973. Since X Corporation has acquired control of Y Corporation, the average annual earnings (as defined in section 279(c)(3)(B) and the annual interest to be paid or incurred (as provided by section 279(c)(4)) of both X Corporation and Y Corporation under section 279(c)(3)(A)(ii) are taken into account in computing for 1973 the ratio of projected earnings to annual interest to be paid or incurred described in section 279(b)(4)(B). Assume further that after applying section 279(b)(4)(B) the obligations issued in 1973 escape treatment as corporate acquisition indebtedness for 1973. Under section 279(d)(3), all of the obligations issued by X Corporation to acquire stock in Y Corporation in 1971 and 1972 are removed from classification as corporate acquisition indebtedness for 1973 and all subsequent taxable years.

Example (5). In 1975, M Corporation, which files its Federal income tax return on the basis of a calendar year, issues its obligations to acquire 30 percent of the voting stock of N Corporation. N Corporation has only one class of stock. Such obligations satisfy the tests prescribed in section 279(b)(1), (2), and (3). Additionally, as of the close of 1975, M Corporation's ratio of debt to equity exceeds the ratio of 2 to 1 and its projected earnings do not exceed three times the annual interest to be paid or incurred. The obligations issued by M Corporation are corporate acquisition indebtedness for 1975 since all the provisions of section 279(b) are satisfied. In 1976 M Corporation issues its obligations to acquire from the shareholders of N Corporation an additional 60 percent of the voting stock of N Corporation, thereby acquiring control of N Corporation. However, with respect to the obligations issued by M Corporation in 1975, there is no redetermination under section 279(d)(3) and subparagraph (3) of this paragraph as to whether such obligations may escape classification as corporate acquisition indebtedness because in 1975 it was the ratio of debt to equity test which caused such obligations to be corporate acquisition indebtedness. If in 1975, M Corporation met the conditions of section 279(b)(4) solely because of the ratio of projected earnings to annual interest to be paid or incurred described in section 279(b)(4)(B), its obligation issued in 1975 could be retested in 1976.

(c) *Acquisition of stock or assets of several corporations.* An issuing corporation which acquires stock in, or assets of, more than one corporation during any taxable year must apply the tests described in section 279(b)(1), (2), and (3) separately with respect to each obligation issued to provide consideration for the acquisition of the stock in, or assets of, each such acquired corporation. Thus, if an acquisition is made with obligations of the issuing corporation that satisfy the tests described in section 279(b)(2) and (3) and obligations that fail to satisfy such tests, only those obligations satisfying such tests need be further considered to determine whether they constitute corporate acquisition indebtedness. Those obligations which meet the test of section 279(b)(1) but which are not deemed corporate acquisition indebtedness shall be taken into account for purposes of determining the reduction in the $5 million limitation of section 279(a)(1).

(d) *Ratio of debt to equity and projected earnings*—(1) *In general.* One of the four tests to determine whether an obligation constitutes corporate acquisition indebtedness is contained in section 279(b)(4). An obligation will meet the test of section 279(b)(4) if, as of a day

determined under section 279(c)(1) and paragraph (b)(2) of this section, either—

(i) The ratio of debt to equity (as defined in paragraph (f) of this section) of the issuing corporation exceeds 2 to 1, or

(ii) The projected earnings (as defined in subparagraph (2) of this paragraph) of the issuing corporation, or of both the issuing corporation and acquired corporation in any case where subparagraph (2)(ii) of this paragraph is applicable, do not exceed three times the annual interest to be paid or incurred (as defined in paragraph (e) of this section) by such issuing corporation, or, where applicable, by such issuing corporation and acquired corporation. Where paragraphs (d)(2)(ii) and (e)(1)(ii) of this section are applicable in computing projected earnings and annual interest to be paid or incurred, 100 percent of the acquired corporation's projected earnings and annual interest to be paid or incurred shall be included in such computation, even though less than all of the stock or assets of the acquired corporation have been acquired.

(2) *Projected earnings.* The term "projected earnings" means the "average annual earnings" (as defined in subparagraph (3) of this paragraph) of—

(i) The issuing corporation only, if subdivision (ii) of this subparagraph, does not apply, or

(ii) Both the issuing corporation and the acquired corporation, in any case where the issuing corporation as of the close of its taxable year has acquired control, or has acquired substantially all of the properties, of the acquired corporation.

For purposes of subdivision (ii) of this subparagraph, an acquisition of "substantially all of the properties" of the acquired corporation means the acquisition of assets representing at least 90 percent of the fair market value of the net assets and at least 70 percent of the fair market value of the gross assets held by the acquired corporation immediately prior to the acquisition.

(3) *Average annual earnings.* (i) The term "average annual earnings" referred to in subparagraph (2) of this paragraph is, for any corporation, the amount of its earnings and profits for any 3-year period ending with the last day of a taxable year of the issuing corporation in which it issues any obligation to provide consideration for an acquisition described in section 279(b)(1), computed without reduction for—

(a) Interest paid or incurred,

(b) Depreciation or amortization allowed under chapter 1 of the Code,

(c) Liability for tax under chapter 1 of the Code, and

(d) Distributions to which section 301(c)(1) apply (other than such distributions from the acquired corporation to the issuing corporation),

and reduced to an annual average for such 3-year period. For the rules to determine the amount of earnings and profits of any corporation, see section 312 and the regulations thereunder.

(ii) Except as provided for in subdivision (iii) of this subparagraph, for purposes of subdivision (i) of this subparagraph in the case of any corporation, the earnings and profits for such 3-year period shall be reduced to an annual average by dividing such earnings and profits by 36 and multiplying the quotient by 12. If a corporation was not in existence during the entire 36-month period as of the close of the taxable year referred to in subdivision (i) of this subparagraph, its average annual earnings shall be determined by dividing its earnings and profits for the period of its existence by the number of whole calendar months in such period and multiplying the quotient by 12.

(iii) Where the issuing corporation acquires substantially all of the properties of an acquired corporation, the computation of earnings and profits of such acquired corporation shall be made for the period of such corporation beginning with the first day of the 3-year period of the issuing corporation and ending with the last day prior to the date on which substantially all of the properties were acquired. In determining the number of whole calendar months for such acquired corporation where the period for determining its earnings and profits includes 2 months which are not whole calendar months and the total number of days in such 2 fractional months exceeds 30 days, the number of whole calendar months for such period shall be increased by one. Where the number of days in the 2 fractional months total 30 days or less such fractional months shall be disregarded. After the number of whole calendar months is determined, the calculation for average annual earnings shall be made in the same manner as described in the last sentence of subdivision (ii) of this subparagraph.

(e) *Annual interest to be paid or incurred.*—(1) *In general.* For purposes of section 279(b)(4)(B), the term "annual interest to be paid or incurred" means—

(i) If subdivision (ii) of this subparagraph does not apply, the annual interest to be paid or incurred by the issuing corporation only, for the taxable year beginning immediately after the day described in section 279(c)(1), determined by reference to its total indebtedness outstanding as of such day, or

(ii) If projected earnings are determined under paragraph (d)(2)(ii) of this section, the annual interest to be paid or incurred by both the issuing corporation and the acquired corporation for 1 year beginning immediately after the day described in section 279(c)(1), determined by reference to their combined total indebtedness outstanding as of such day. However, where the issuing corporation acquires substantially all of the properties of the acquired corporation, the annual interest to be paid or incurred will be determined by reference to the total indebtedness outstanding of the issuing corporation only (including any indebtedness it assumed in the acquisition) as of the day described in section 279(c)(1).

The term "annual interest to be paid or incurred" refers to both actual interest and unstated interest. Such unstated interest includes original issue discount as defined in paragraph (a)(1) of § 1.163-4 and amounts treated as interest under section 483. For purposes of this paragraph and paragraph (f) of this section (relating to the ratio of debt to equity), the indebtedness of any corporation shall be determined in accordance with generally accepted accounting principles. Thus, for example, the indebtedness of a corporation includes short-term liabilities, such as accounts payable to suppliers, as well as long-term indebtedness. Contingent liabilities, such as those arising out of discounted notes, the assignment of accounts receivable, or the guarantee of the liability of another, shall be included in the determination of the indebtedness of a corporation if the contingency is likely to become a reality. In addition, the indebtedness of a corporation includes obligations issued by the corporation, secured only by property of the corporation, and with respect to which the corporation is not personally liable. See section 279(g) and § 1.279-6 for rules with respect to the computation of annual interest to be paid or incurred in regard to members of an affiliated group of corporations.

(2) *Examples.* The provisions of these paragraphs may be illustrated by the following examples:

Example (1). Corporation X's earnings and profits calculated in accordance with section 279(c)(3)(B) for 1972, 1971, and 1970 respectively were $29 million, $23 million, and $20 million. The interest to be paid or incurred during the calendar year of 1973 as determined by reference to the issuing corporation's total outstanding indebtedness as of December 31, 1972, was $10 million. By dividing the sum of the earnings and profits for the 3 years by 36 (the number of whole calendar months in the 3-year period) and multiplying the quotient by 12, the average annual earnings for X Corporation is $24 million. Since the projected earnings of X Corporation do not exceed by three times the annual interest to be paid or incurred (they exceed by only 2.4 times), one of the circumstances described in section 279(b)(4) is present.

Example (2). On March 1, 1972, W Corporation acquires substantially all of the properties of Z Corporation in exchange for W Corporation's bonds which satisfy the tests of section 279(b)(2) and (3). W Corporation files its income tax returns on the basis of fiscal years ending June 30. Z Corporation, which was formed on September 1, 1969, is a calendar year taxpayer. The earnings and profits of W Corporation for the last 3 fiscal years ending June 30, 1972, calculated in accordance with the provisions of section 279(c)(3)(B) were $300 million, $400 million, and $380 million, respectively. The average annual earnings of W Corporation is $360 million ($1,080 million÷36×12). The earnings and profits of Z Corporation calculated in accordance with the provisions of section 279(c)(3)(B) were $4 million for the period of September 1, 1969 to December 31, 1969, $10 million and $14 million for the calendar years of 1970 and 1971, respectively, and $2 million for the period of January 1, 1972, through February 29, 1972, or a total of $30 million. To arrive at the average annual earnings, the sum of the earnings and profits,

$30 million, must be divided by 30 (the number of whole calendar months that Z Corporation was in existence during W Corporation's 3-year period ending with the day prior to the date substantially all the assets were acquired) and the quotient is multiplied by 12, which results in an average annual earnings of $12 million ($30 million÷30×12) for Z Corporation. The combined average annual earnings of W Corporation and Z Corporation is $372 million. The interest for the fiscal year ending June 30, 1973, to be paid or incurred by W Corporation on its outstanding indebtedness as of June 30, 1972, is $110 million. Since the projected earnings exceed the annual interest to be paid or incurred by more than three times, the obligation will not be corporate acquisition indebtedness, unless the issuing corporation's debt to equity ratio exceeds 2 to 1.

(f) *Ratio of debt to equity*—(1) *In general.* The condition described in section 279(b)(4)(A) is present if the ratio of debt to equity of the issuing corporation exceeds 2 to 1. Under section 279(c)(2), the term "ratio of debt to equity" means the ratio which the total indebtedness of the issuing corporation bears to the sum of its money and all its other assets (in an amount equal to adjusted basis for determining gain) less such total indebtedness. For the meaning of the term "indebtedness", see paragraph (e)(1) of this section. See section 279(g) and § 1.279–6 for rules with respect to the computation of the ratio of debt to equity in regard to an affiliated group of corporations.

(2) *Examples.* The provisions of section 279(b)(4)(A) and this paragraph may be illustrated by the following example:

Example (1). On June 1, 1971, X Corporation, which files its federal income tax returns on a calendar year basis, issues an obligation for $45 million to the shareholders of Y Corporation to provide consideration for the acquisition of all of the stock of Y Corporation. Such obligation has the characteristics of corporate acquisition indebtedness described in section 279(b)(2) and (3). The projected earnings of X Corporation and Y Corporation exceed 3 times the annual interest to be paid or incurred by those corporations and, accordingly, the condition described in section 279(b)(4)(B) is not present. Also, on December 31, 1971, X Corporation has total assets with an adjusted basis of $150 million (including the newly acquired stock of Y Corporation having a basis of $45 million) and total indebtedness of $90 million. Hence, X Corporation's equity is $60 million computed by subtracting its $90 million of total indebtedness from its $150 million of total assets. Since X Corporation's ratio of debt to equity of 1.5 to 1 ($90 million of total indebtedness over $60 million equity) does not exceed 2 to 1, the condition described in section 279(b)(4)(A) is not present. Therefore, X Corporation's obligation for $45 million is not corporate acquisition indebtedness because on December 31, 1971, neither of the conditions specified in section 279(b)(4) existed.

(g) *Special rules for banks and lending or finance companies*—(1) *Debt to equity and projected earnings.* Under section 279(c)(5), with respect to any corporation which is a bank (as defined in section 581) or is primarily engaged in a lending or finance business, the following rules are to be applied:

(i) In determining under paragraph (f) of this section the ratio of debt to equity of such corporation (or of the affiliated group of which such corporation is a member), the total indebtedness of such corporation (and the assets of such corporation) shall be reduced by an amount equal to the total indebtedness owed to such corporation which arises out of the banking business of such corporation, or out of the lending or finance business of such corporation, as the case may be;

(ii) In determining under paragraph (e) of this section the annual interest to be paid or incurred by such corporation (or by the issuing corporation and acquired corporation referred to in section 279(c)(4)(B) or by the affiliated group of corporations of which such corporation is a member), the amount of such interest (determined without regard to this subparagraph) shall be reduced by an amount which bears the same ratio to the amount of such interest as the amount of the reduction for the taxable year under subdivision (i) of this subparagraph bears to the total indebtedness of such corporation; and

(iii) In determining under section 279(c)(3)(B) the average annual earnings, the amount of the earnings and profits for the 3-year period shall be reduced by the sum of the reductions under subdivision (ii) of this subparagraph for such period.

For purposes of this paragraph, the term "lending or finance business" means a business of making loans or purchasing or discounting accounts receivable, notes, or installment obligations. Additionally, the rules stated in this paragraph regarding the application of the ratio of debt to equity, the determination of the annual interest to be paid or incurred, and the determination of the average annual earnings also apply if the bank or lending or finance company is a member of an affiliated group of corporations. However, the rules are to be applied only for purposes of determining the debt, equity, projected earnings and annual interest of the bank or lending or finance company which then are taken into account in determining the debt to equity ratio and ratio of projected earnings to annual interest to be paid or incurred by the affiliated group as a whole. Thus, these rules are to be applied to reduce the bank's or lending or finance corporation's indebtedness, annual interest to be paid or incurred, and average annual earnings which are taken into account with respect to the group, but are not to reduce the indebtedness of, annual interest to be paid or incurred by, and average annual earnings of, any corporation in the affiliated group which is not a bank or a lending or finance company. In determining whether any corporation which is a member of an affiliated group is primarily engaged in a lending or finance business, only the activities of such corporation, and not those of the whole group, are to be taken into account. See § 1.279–6 for the application of section 279 to certain affiliated groups of corporations.

(2) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

Example (1). As of the close of the taxable year, X Bank has a total indebtedness of $100 million, total assets of $115 million, and $80 million is owed to X Bank by its customers. Bank X's indebtedness is $20 million ($100 million total indebtedness less $80 million owed to the X Bank by its customers) and its assets are $35 million ($115 million total assets less $80 million owed to the bank by its customers). If its annual interest to be paid or incurred is $5 million, such amount is reduced by $4 million

$$\left(\$5 \text{ million interest to be paid or incurred} \times \frac{\$80 \text{ million owed to X Bank by its customers}}{\$100 \text{ million total indebtedness.}}\right)$$

Thus, X Bank's annual interest to be paid or incurred is $1 million.

Example (2). Assume the same facts as in example (1). X Bank has earnings and profits of $23 million for the 3-year period used to determine projected earnings. In computing the average annual earnings, the $23 million amount will be reduced by $12 million (three times the $4 million reduction of interest in example (1), assuming that the reduction was the same for each year). Thus X Bank's earnings and profits for such 3-year period are $11 million ($23 million total earnings and profits less $12 million reduction).

(h) *Statement to be attached to return.* In any case where any corporation claims a deduction in excess of $5 million for interest paid or incurred during the taxable year on obligations issued to provide consideration for acquisitions described in section 279(b)(1) of stock in, or assets of, an acquired corporation, the corporation shall attach to its return for such taxable year a statement which includes the particular provisions of section 279 and, in sufficient detail, the facts establishing that such obligations were not corporate acquisition indebtedness, or that the amount of the deduction for interest on its corporate acquisition indebtedness did not exceed the amount of interest which may be deducted on such obligations under section 279(a).

§ 1.279–6 Application of section 279 to certain affiliated groups.

(a) *In general.* Under section 279(g), in any case in which the issuing corporation is a member of an affiliated group, the application of section 279 shall be determined by treating all of the members of the affiliated group in the aggregate as the issuing corporation, except that the ratio of debt to equity of, projected earnings of, and the annual interest to be paid or incurred by any corporation (other than the issuing corporation determined without regard to this paragraph) shall be included in the determinations required under section 279(b)(4) as of any day only if such corporation is a member of the affiliated group on such day, and, in determining projected earnings of such corporation under section 279(c)(3), there shall be

taken into account only the earnings and profits of such corporation for the period during which it was a member of the affiliated group. The total amount of an affiliated member's assets, indebtedness, projected earnings, and interest to be paid or incurred will enter into the computation required by this section, irrespective of any minority ownership in such member.

(b) *Aggregate money and other assets.* In determining the aggregate money and all the other assets of the affiliated group, the money and all the other assets of each member of such group shall be separately computed and such separately computed amounts shall be added together, except that adjustments shall be made, as follows:

(1) There shall be eliminated from the aggregate money and all the other assets of the affiliated group intercompany receivables as of the date described in section 279(c)(1);

(2) There shall be eliminated from the total assets of the affiliated group any amount which represents stock ownership in any member of such group;

(3) In any case where gain or loss is not recognized on transactions between members of an affiliated group under paragraph (d)(3) of this section, the basis of any asset involved in such transaction shall be the transferor's basis;

(4) The basis of property received in a transaction to which § 1.1502-31(b) applies shall be the basis of such property determined under such section; and

(5) There shall be eliminated from the money and all the other assets of the affiliated group any other amount which, if included, would result in a duplication of amounts in the aggregate money and all the other assets of the affiliated group.

(c) *Aggregate indebtedness.* For purposes of applying section 279(c), in determining the aggregate indebtedness of an affiliated group of corporations the total indebtedness of each member of such group shall be separately determined, and such separately determined amounts shall be added together, except that there shall be eliminated from such total indebtedness as of the date described in section 279(c)(1)—

(1) The amount of intercompany accounts payable,

(2) The amount of intercompany bonds or other evidences of indebtedness, and

(3) The amount of any other indebtedness which, if included, would result in a duplication of amounts in the aggregate indebtedness of such affiliated group.

(d) *Aggregate projected earnings.* In the case of an affiliated group of corporations (whether or not such group files a consolidated return under section 1501), the aggregate projected earnings of such group shall be computed by separately determining the projected earnings of each member of such group under paragraph (d) of § 1.279-5, and then adding together such separately determined amounts, except that—

(1) A dividend (a distribution which is described in section 301(c)(1) other than a distribution described in section 243(c)(1)) distributed by one member to another member shall be eliminated, and

(2) In determining the earnings and profits of any member of an affiliated group, there shall be eliminated any amount of interest income received or accrued, and of interest expense paid or incurred, which is attributable to intercompany indebtedness,

(3) No gain or loss shall be recognized in any transaction between members of the affiliated group, and

(4) Members of an affiliated group who file a consolidated return shall not apply the provisions of § 1.1502-18 dealing with inventory adjustments in determining earnings and profits for purposes of this section.

(e) *Aggregate interest to be paid or incurred.* For purposes of section 279(c)(4), in determining the aggregate annual interest to be paid or incurred by an affiliated group of corporations, the annual interest to be paid or incurred by each member of such affiliated group shall be separately calculated under paragraph (e) of § 1.279-5, and such separately calculated amounts shall be added together, except that any amount of annual interest to be paid or incurred on any intercompany indebtedness shall be eliminated from such aggregate interest.

§ 1.279-7 Effect on other provisions.

Under section 279(j), no inference is to be drawn from any provision in section 279 and the regulations thereunder that any instrument designated as a bond, debenture, note, or certificate or other evidence of indebtedness by its issuer represents an obligation or indebtedness of such issuer in applying any other provision of this title. Thus, for example, an instrument, the interest on which is not subject to disallowance under section 279 could, under section 385 and the regulations thereunder, be found to constitute a stock interest, so that any amounts paid or payable thereon would not be deductible.

[FR Doc.73-4097 Filed 3-2-73;8:45 am]

Title 36—Parks, Forests and Memorials

CHAPTER I—NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR

PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

Ozark National Scenic Riverways, Missouri; Boating, Scuba Diving, Spelunking

A proposal was published at page 20562 of the FEDERAL REGISTER of September 30, 1972, to add § 7.83 to Title 36 of the Code of Federal Regulations. The effect of the proposal is to establish needed restrictions on certain visitor activities within the boundaries of the Ozark National Scenic Riverways.

Interested persons were given 30 days for submitting written comments, suggestions, or objections with respect to the proposed amendment. In addition, a public meeting was held at Eminence, Mo., on November 10, 1972 to receive public comments. As a result of the comments received, the proposed regulations are being adopted with the following changes: restrictions concerning vessel motor horsepower, river zoning pertaining to the use of vessels with motors, solo diving, and cave entry have been deleted pending further study. No major revisions were made in the retained portions of previously published proposal.

Accordingly, the proposed regulations are hereby adopted as set forth below. They will take effect April 4, 1973.

§ 7.83 Ozark National Scenic Riverways.

(a) *Boating.* A vessel, commonly referred to as a "jet boat" is prohibited on the Current River and the tributaries thereof and the Jacks Fork River within the boundaries of Ozark National Scenic Riverways.

(b) *Scuba Diving.* (1) Scuba diving is prohibited within all springs and spring branches on federally owned land within the boundaries of Ozark National Scenic Riverways without a written permit from the superintendent.

(2) *Permits.* The superintendent may issue written permits for scuba diving in springs within the boundaries of the Ozark National Scenic Riverways; *Provided,*

(i) That the permit applicant will be engaged in scientific or educational investigations which will have demonstrable value to the National Park Service in its management or understanding of riverways resources.

RANDALL R. POPE,
Superintendent,
Ozark National Scenic Riverways.

[FR Doc.73-4050 Filed 3-2-73;8:45 am]

CHAPTER II—FOREST SERVICE, DEPARTMENT OF AGRICULTURE

RECREATION IN NATIONAL FORESTS

Redesignation of Existing Regulations

Due to the complexity of Part 251, Land Uses, six additional parts, 290 through 295, are added to Chapter II, Title 36 of the Code of Federal Regulations. Several sections are transferred to these new parts from Part 251 and redesignated with new section numbers. These are existing regulations scattered throughout Part 251 which pertain to recreation in the National Forests. They are being redesignated for better public understanding and ease of use. There are no changes to the existing regulations.

The new parts are shown below in outline form. If a section has been transferred to one of these parts from Part 251, its former section number is also shown.

PART 290—RECREATION MANAGEMENT
[RESERVED]

PART 291—OCCUPANCY AND USE OF DEVELOPED SITES AND AREAS OF CONCENTRATED PUBLIC USE

Section		Former section No.
291.1	[Reserved]	
291.2		251.90
291.3		251.91
291.4		251.92
291.5		251.93

Section	Former section No.
291.6	251.94
291.7	251.95
291.8	251.96
291.9	251.25a

PART 292—NATIONAL RECREATION AREAS

Section	Former section No.
292.1–292.10 [Reserved]	
292.11	251.40
292.12	251.41
292.13	251.42
292.14–292.19 [Reserved]	

PART 293—WILDERNESS—PRIMITIVE AREAS

Section	Former section No.
293.1	251.70
293.2	251.71
293.3	251.72
293.4	251.73
293.5	251.74
293.6	251.75
293.7	251.76
293.8	251.77
293.9	251.78
293.10	251.79
293.11	251.80
293.12	251.81
293.13	251.82
293.14	251.83
293.15	251.84
293.16	251.85
293.17	251.86

PART 294—SPECIAL AREAS

Section	Former section No.
294.1	251.22
294.2(a)	251.26
294.2(b)	251.27
294.2(c)	251.28
294.2(d)	251.29
294.2(e)	251.30
294.2(f)	251.31

PART 295—USE OF OFF-ROAD VEHICLES [RESERVED]

PARTS 296–299 [RESERVED]

NOTE: By order published at 30 FR 5631, April 21, 1965, such lands as are described under § 294.1, "shall continue to be managed, insofar as is not inconsistent with the Wilderness Act of September 3, 1964 (Public Law 88-577, 78 Stat. 890), under the applicable regulations * * * in effect on September 3, 1964 * * * until such time as amendments can be promulgated with specific reference to the Wilderness Act."

In accordance with the exceptions to rule making procedures in 5 U.S.C. 553 and USDA policy (36 FR 13804), it has been found and determined that advance notice and request for comments would be unnecessary.

Effective date. This redesignation takes place on March 5, 1973.

T. K. COWDEN,
Assistant Secretary of Agriculture.

FEBRUARY 22, 1973.

In 36 CFR Chapter II, Part 251 is amended and new Parts 290–299 are added as set forth below.

PART 251—LAND USES

In Part 251, §§ 251.22, 251.25a, 251.26–251.30, 251.40–251.42, 251.70–251.86, 251.90–251.96 are deleted.

PART 290—RECREATION MANAGEMENT [RESERVED]

PART 291—OCCUPANCY AND USE OF DEVELOPED SITES AND AREAS OF CONCENTRATED PUBLIC USE

Sec.
291.1 General applicability. [Reserved]
291.2 Definitions.
291.4 Sanitation.
291.5 Public behavior, preservation of public property and resources.
291.6 Audio devices.
291.7 Occupancy of developed recreation sites.
291.8 Vehicles.
291.9 Admission fees and special recreation use fees.

AUTHORITY: Sec. 1, 30 Stat. 35, as amended, 62 Stat. 100, sec. 1, 33 Stat. 628; 16 U.S.C. 551, 472, unless otherwise noted.

§ 291.1 General applicability. [Reserved]

§ 291.2 Definitions.

The following definitions shall apply to all regulations in §§ 291.2 through 291.8:

(a) The term "developed recreation sites" means all improved observation, swimming, boating, camping, and picnic sites.

(b) The word "sites" refers to recreation sites.

(c) The term "areas of concentrated public recreation use" means those areas identified by a posted map delineating its boundaries.

(d) The word "areas" refers to areas of concentrated public recreation use.

(e) The term "camping equipment" includes tent or vehicle used to accommodate the camper, the vehicles used for transport, and the associated camping paraphernalia.

§ 291.4 Sanitation.

The following acts are prohibited at developed recreation sites and posted areas of concentrated public recreation use.

(a) Failing to dispose of all garbage, including paper, cans, bottles, waste materials, and rubbish by removal from the site or area, or disposal at places provided for such disposition.

(b) Draining or dumping refuse or waste from any trailer or other vehicle except in places or receptacles provided for such uses.

(c) Cleaning fish or food, or washing clothing or articles of household use at hydrants or at water faucets located in restrooms.

(d) Polluting or contaminating water supplies or water used for human consumption.

(e) Depositing, except into receptacles provided for that purpose, any body waste in or on any portion of any comfort station or any public structure, or depositing any bottles, cans, cloths, rags, metal, wood, stone, or other damaging substance in any of the fixtures in such stations or structures.

(f) Using refuse containers or other refuse facilities for dumping household or commercial garbage or trash brought as such from private property.

§ 291.5 Public behavior, preservation of public property and resources.

The following acts are prohibited at developed recreation sites and posted areas of concentrated public recreation use.

(a) Inciting or participating in riots, or indulging in boisterous, abusive, threatening, or indecent conduct.

(b) Destroying, defacing, or removing any natural feature or plant .

(c) Destroying, injuring, defacing, removing, or disturbing in any manner any public building, sign, equipment, marker, or other structure or property.

(d) Selling or offering for sale any merchandise without the written consent of the Forest Supervisor.

(e) Distributing any handbills, or circulars, or posting, placing, or erecting any bills, notices, papers, or advertising devices or matter of any kind without the written consent of the Forest Supervisor.

(f) Discharging firearms, firecrackers, rockets, or any other fireworks.

§ 291.6 Audio devices.

The following acts are prohibited at developed recreation sites and posted areas of concentrated public recreation use.

(a) Operating or using any audio devices, including radio, television, and musical instruments, and other noise producing devices, such as electrical generator plants and equipment driven by motors or engines, in such a manner and at such times so as to disturb other persons.

(b) Operating or using public address systems, whether fixed, portable, or vehicle mounted, except when such use or operation has been approved by the Forest Supervisor in writing.

(c) Installing aerial or other special radiotelephone or television equipment unless approved by the Forest Supervisor in writing.

§ 291.7 Occupancy of developed recreation sites.

The following acts are prohibited within developed recreation sites.

(a) Occupying a site for other than primarily recreation purposes.

(b) Entering or using a site or a portion of a site closed to public use. Notices establishing closure shall be posed in such locations as will reasonably bring them to the attention of the public.

(c) Erecting or using unsightly or inappropriate structures.

(d) Occupying a site with camping equipment prohibited by the Forest Supervisor. Notices establishing limitations on the kind or type of camping equipment shall be posted in such locations as will reasonably bring them to the attention of the public.

(e) Building a fire outside of stoves, grills, fireplaces, or outside of fire rings provided for such purpose.

(f) Camping overnight in places restricted to day use only.

(g) Before departure, failing to remove their camping equipment or to clean their rubbish from the place occupied by the person or persons.

(h) Pitching tents or parking trailers or other camping equipment except in places provided for such purposes.

(i) Camping within a campground for a longer period of time than that established by the Forest Supervisor. Notices establishing limitations on the period of time persons may camp within a campground shall be posted in such locations as will reasonably bring them to the attention of the public.

(j) Leaving a camp unit unoccupied during the first night after camping equipment has been set up, or leaving unattended camping equipment for more than 24 hours thereafter, without permission of a Forest Officer. Unattended camping equipment which is not removed within the prescribed time limit is subject to impoundment in accordance with the provisions of § 261.16 of this chapter.

(k) Failing to maintain quiet in campgrounds between the hours of 10 p.m. and 6 a.m.

(l) Entering or remaining in campground closed during established night periods to persons other than those who occupy the campground for camping purposes or persons visiting those campers. Notices establishing the period of closure shall be posted in such locations as will reasonably bring them to the attention of the public.

(m) Bringing a dog, cat, or other animal into the site unless it is crated, caged, or upon a leash not longer than 6 feet, or otherwise under physical restrictive control at all times.

(n) Bringing animals, other than Seeing Eye dogs, to a developed swimming beach.

(o) Bringing saddle, pack, or draft animals into the site unless it has been developed to accommodate them and is posted accordingly.

§ 291.8 Vehicles.

The following are prohibited at developed recreation sites.

(a) Driving motor vehicles in excess of posted speeds.

(b) Driving or parking any vehicle or trailer except in places developed for this purpose.

(c) Driving any vehicle carelessly and heedlessly disregarding the rights or safety of others, or without due caution and at a speed, or in a manner, so as to endanger, or be likely to endanger, any person or property.

(d) Driving bicycles, motorbikes, and motorcycles on trails within developed recreation sites.

(e) Driving motorbikes, motorcycles, or other motor vehicles on roads in developed recreation sites for any purpose other than access into, or egress out of, the site.

(f) Operating a motor vehicle at any time without a muffler in good working order, or operating a motor vehicle in such a manner as to create excessive or unusual noise or annoying smoke, or using a muffler cutoff, bypass, or similar device.

(g) Excessively accelerating the engine of a motor vehicle or motorcycle when such vehicle is not moving or is approaching or leaving a stopping place.

§ 291.9 Admission fees and special recreation use fees.

(a) Fees will be charged for admission or entrance to designated units of national recreation areas administered by the Department of Agriculture as provided by section 4(a) of the Land and Water Conservation Fund Act of 1965, as amended. Such fees shall be established by the Chief, Forest Service, or his delegate. Admission or entrance into any designated area of a national recreation area without payment of the established fee is prohibited.

(b) Special recreation use fees will be charged for the use of sites, facilities, equipment, or services furnished at Federal expense as provided by section 4(b) of the Land and Water Conservation Fund Act of 1965, as amended. Such fees shall be established by the Chief, Forest Service, or his delegate. Use of sites, facilities, equipment or services without payment of the established special recreation use fee is prohibited.

(c) Clear notice that an admission or entrance fee or special recreation use fee has been established shall be prominently posted at each area and at appropriate locations therein and shall be included in publications distributed at such areas. Any violation of this section is punishable by a fine of not more than $100.

(Sec. 4, 86 Stat. 459)

PART 292—NATIONAL RECREATION AREAS

Subpart A—General [Reserved]

Sec.
292.1–292.10 [Reserved]

Subpart B—Whiskeytown-Shasta-Trinity National Recreation Area

Sec.
292.11 Introduction.
292.12 General provisions; procedures.
292.13 Standards.

Subpart C—Sawtooth National Recreation Area—Private Lands [Reserved]

Subpart D—Sawtooth National Recreation Area—Federal Lands [Reserved]

AUTHORITY: Sec. 1, 30 Stat. 35, as amended, 62 Stat. 100, Sec. 1, 33 Stat. 628; 16 U.S.C. 551, 472, unless otherwise noted.

Subpart A—General [Reserved]

§§ 292.1–292.10 [Reserved]

Subpart B—Whiskeytown-Shasta-Trinity National Recreation Area

§ 292.11 Introduction.

(a) Administration of the Shasta and Clair Engle-Lewiston Units will be coordinated with the other purposes of the Central Valley Project of the Bureau of Reclamation and of the recreation area as a whole so as to provide for: (1) Public outdoor recreation benefits; (2) conservation of scenic, scientific, historic, and other values contributing to public enjoyment; and (3) the management, utilization, and disposal of renewable natural resources which in the judgment of the Secretary of Agriculture will promote or is compatible with, and does not significantly impair, public recreation and conservation of scenic, scientific, historic, or other values contributing to public enjoyment.

(b) The Secretary may not acquire without consent of the owner any privately owned "improved property" or interests therein within the boundaries of these units, so long as the appropriate local zoning agency shall have in force and applicable to such property a duly adopted, valid, zoning ordinance that is approved by the Secretary. This suspension of the Secretary's authority to acquire "improved property" without the owner's consent would automatically cease: (1) If the property is made the subject of a variance or exception to any applicable zoning ordinance that does not conform to the applicable standards contained in §§ 292.11–292.13; or (2) if such property is put to any use which does not conform to any applicable zoning ordinance approved by the Secretary.

(c) "Improved property" as used in §§ 292.11–292.13, means any building or group of related buildings, the actual construction of which was begun before February 7, 1963, together with not more than three acres of land in the same ownership on which the building or group of buildings is situated, but the Secretary may exclude from such "improved property" any shore or waters, together with so much of the land adjoining such shore or waters, as he deems necessary for public access thereto.

(d) Sections 292.11–292.13 specify the standards with which local zoning ordinances for the Shasta and Clair Engle-Lewiston Units must conform if the "improved property" or unimproved property proposed for development as authorized by the Act within the boundaries of the units is to be exempt from acquisition by condemnation. The objectives of §§ 292.11–292.13 are to: (1) Prohibit new commercial or industrial uses other than those which the Secretary considers to be consistent with the purposes of the act establishing the national recreation area; (2) promote the protection and development of properties in keeping with the purposes of that Act by means of use, acreage, setback, density, height or other requirements; and (3) provide that the Secretary receive notice of any variance granted under, or any exception made to, the application of the zoning ordinance approved by him.

(e) Following promulgation of §§ 292.11–292.13 in final form, the Secretary is required to approve any zoning ordinance or any amendment to an approved zoning ordinance submitted to him which conforms to the standards contained in the regulations in effect at the time of adoption of the ordinance or amendment.

(f) Any owner of unimproved property who proposes to develop his property for service to the public may submit to the Secretary a development plan setting forth the manner in which and the time by which the property is to be developed and the use to which it is proposed to be put. If the Secretary determines that the development and the use of the property conforms to approved

zoning ordinances, and serves the purposes of the National Recreation Area and that the property is not needed for easements and rights-of-way for access, utilities, or facilities, or for administration sites, campgrounds, or other areas needed for use by the United States for visitors, he may in his discretion issue to such owner a certification that so long as the property is developed, maintained, and used in conformity with approved zoning ordinances the Secretary's authority to acquire the property without the owner's consent is suspended.

§ 292.12 General provisions; procedures.

(a) *Approval of zoning ordinances and development plans.* (1) All validly adopted zoning ordinances and amendments thereto pertaining to the Shasta and Clair Engle-Lewiston Units may be submitted by the county of origin to the Secretary for written approval relative to their conformance with the applicable standards of §§ 292.11–292.13. Within 60 days following submission, the county will be notified of the Secretary's approval or disapproval of the zoning ordinances or amendments thereto. If more than 60 days are required, the county will be notified of the expected delay and of the additional time deemed necessary to reach a decision. The Secretary's approval shall remain effective so long as the zoning ordinances or amendments thereto remain in effect as approved.

(2) Development plans pertaining to unimproved property within the Shasta and Clair Engle-Lewiston Units may be submitted by the owner to the Secretary for determination as to whether they conform with approved zoning ordinances and whether the planned use and development would serve the Act. Within 30 days following submission of such plans the Secretary will approve or disapprove the plans or, if more than 30 days are required, will notify the applicant of the expected delay and of the additional time deemed necessary.

(b) *Amendment of ordinances.* Amendments of approved ordinances may be furnished in advance of their adoption to the Secretary for written decision as to their conformance with applicable standards of §§ 292.11–292.13.

(c) *Variances or exceptions to application of ordinances.* (1) The Secretary shall be given written notice of any variance granted under, or any exception made to, the application of a zoning ordinance or amendment thereto approved by him.

(2) The County, or private owners of improved property, may submit to the Secretary proposed variances or exceptions to the application of an approved zoning ordinance or amendment thereto for written advice as to whether the intended use will make the property subject to acquisition without the owner's consent. Within 30 days following his receipt of such a request, the Secretary will advise the interested party or parties as to his determination. If more than 30 days are required by the Secretary for such determination, he shall so notify the interested party or parties stating the additional time required and the reasons therefore.

(d) *Certification of property.* Where improvements and land use of improved property conform with approved ordinances, or with approved variances from such ordinances, certification that the Secretary's authority to acquire the property without the owner's consent is suspended may be obtained by any party in interest upon request to the Secretary. Where the development and use of unimproved property for service to the public is approved by the Secretary, certification that the authority to acquire the property without the owner's consent is suspended may be issued to the owner.

(e) *Effect of noncompliance.* Suspension of the Secretary's authority to acquire any improved property without the owner's consent will automatically cease if (1) such property is made the subject of variance or exception to any applicable zoning ordinance that does not conform to the applicable standard in the Secretary's regulation, (2) such property is put to a use which does not conform to any applicable zoning ordinance, or, as to property approved by the Secretary for development, a use which does not conform to the approved development plan or (3) the local zoning agency does not have in force a duly adopted, valid, zoning ordinance that is approved by the Secretary in accordance with the standards of §§ 292.11–292.13.

(f) *Nonconforming commercial or industrial uses.* Any existing commercial or industrial uses not in conformance with approved zoning ordinances shall be discontinued within 10 years from the date such ordinances are approved: *Provided, however,* That with the approval of the Secretary such 10-year period may be extended by the county for a prescribed period sufficient to allow the owner reasonable additional time to amortize investments made in the property before November 8, 1965.

§ 292.13 Standards.

(a) The standards set forth in §§ 292.11–292.13 shall apply to the Shasta and Clair Engle-Lewiston Units, which are defined by the boundary descriptions in the notice of the Secretary of Agriculture of July 12, 1966 (31 FR 9469), and to a strip of land outside the National Recreation Area on either side of Federal Aid Secondary Highway Numbered 1089, as more fully described in 2(a) of the act establishing the recreation area (79 Stat. 1296).

(b) New industrial or commercial uses: new industrial or commercial uses will be prohibited in any location except under the following conditions:

(1) The industrial use is such that its operation, physical structures, or waste byproducts would not have significant adverse impacts on surrounding or nearby outdoor recreation, scenic and esthetic values. Industrial uses having an adverse impact include, but are not limited to, cement production, gravel extraction operations involving more than one-fourth acre of surface, smelters, sand, gravel and aggregate processing plants, fabricating plants, pulpmills, and commercial livestock feeder yards.

(2) (i) The commercial use is for purposes of providing food, lodging, automotive or marine maintenance facilities and services to accommodate recreationists and the intended land occupancy and physical structures are such that they can be harmonized with adjacent land development and surrounding appearances in accordance with approved plans and schedules.

(ii) This standard provides for privately owned and operated businesses whose purposes and physical structures are in keeping with objectives for use and maintenance of the area's outdoor recreation resources. It precludes establishment of drive-in theaters, zoos, and similar nonconforming types of commercial entertainment.

(c) Protection of roadsides: Provisions to protect natural scenic qualities and maintain screening along public travel routes will include:

(1) Prohibition of new structural improvements or visible utility lines within a strip of land extending back not less than 150 feet from both sides of the centerline of any public road or roadway except roads within subdivisions or commercial areas. In addition to buildings, this prohibition pertains to above-ground power and telephone lines, borrow pits, gravel, or earth extraction areas, and quarries.

(2) Retention of trees and shrubs in the above-prescribed roadside strips to the full extent that is compatible with needs for public safety and road maintenance. Wholesale clearing by chemical or other means for fire control and other purposes will not be practiced under this standard.

(d) Protection of shorelines: Provisions to protect scenic qualities and reduce potentials for pollution of public reservoirs will include: Prohibition of structures within 300 feet horizontal distance from highwater lines of reservoirs other than structures the purpose of which is to service and accommodate boating or to facilitate picnicking and swimming: *Provided,* That exceptions to this standard may be made upon showing satisfactory to the Secretary that proposed structures will not conflict with scenic and antipollution considerations.

(e) Property development: Location and development of structures will conform with the following minimum standards:

(1) *Commercial development.* (i) Stores, restaurants, garages, service stations, and comparable business enterprises will be situated in centers zoned for this purpose unless they are operated as part of a resort or hotel. Commercial centers will be of sufficient size that expansion of facilities or service areas is not dependent upon use of public land.

(ii) Sites outside designated commercial centers will be used for resort development contingent upon case by case concurrence of the responsible county officials and the Secretary that such use is, in all aspects, compatible with the

purposes for establishing the recreation area.

(iii) Structures for commercial purposes, inclusive of isolated resorts or motels, will not exceed two stories height at front elevation, and will be conventional architecture and will utilize colors, nonglare roofing materials, and spacing or layout that harmonizes with forested settings. Except for signs, structures designed primarily for purposes of calling attention to products or service will not be permitted.

(2) *Residential development.* (i) Locations approved for residential development will be buffered by distance, topography, or forest cover from existing or planned public use areas such as trailer parks, campgrounds, or organization sites. Separation will be sufficient to avoid conflicts resulting from intervisibility, noise, and proximity that is conducive to private property trespass.

(ii) Requirements for approval of residential areas will include: (*a*) Construction of access when main access would otherwise be limited to a road constructed by the United States primarily to service publicly owned recreation developments; (*b*) limitation of residences to single-family units situated at a density not exceeding two per acre, but any lot of less than a half-acre may be used for residential purposes if, on or before promulgation of §§ 292.11–292.13, such lot was in separate ownership or was delineated in a county-approved plat that constitutes part of a duly recorded subdivision; (*c*) use of set-backs, limitations to natural terrain, neutral exterior colors, nonglare roofing materials, and limitations of building heights fully adequate to harmonize housing development with the objective of the National Recreation Area as set forth in the act.

(3) *Signs and signing.* Only those signs may be permitted which (i) do not exceed 1 square foot in area for any residential use; (ii) do not exceed 40 square feet in area, 8 feet in length, and 15 feet maximum height from ground for any other use, including advertisement of the sale or rental of property; and (iii) which are not illuminated by any neon or flashing device. Commercial signs may be placed only on the property on which the advertised use occurs, or on the property which is advertised for sale or rental. Signs shall be subdued in appearance, harmonizing in design and color with the surroundings and shall not be attached to any tree or shrub. Nonconforming signs may continue for a period not to exceed 2 years from the date a zoning ordinance containing these limitations is adopted.

Subpart C—Sawtooth National Recreation Area—Private Lands

§§ 292.14–292.16 [Reserved]

Subpart D—Sawtooth National Recreation Area—Federal Lands

§§ 292.17–292.19 [Reserved]

PART 293—WILDERNESS—PRIMITIVE AREAS

Sec.

AUTHORITY: Sec. 1, 30 Stat. 35, as amended, 62 Stat. 100, sec. 1, 33 Stat. 628; 16 U.S.C. 551, 472, unless otherwise noted.

§ 293.1 Definition.

National Forest Wilderness shall consist of those units of the National Wilderness Preservation System which at least 30 days before the Wilderness Act of September 3, 1964, were designated as Wilderness and Wild under Secretary of Agriculture's Regulations U–1 and U–2 (§§ 251.20, 251.21), the Boundary Waters Canoe Area as designated under Regulation U–3 (§ 294.1), and such other areas of the National Forests as may later be added to the System by act of Congress. Sections 293.1 to 293.15 apply to all National Forest units now or hereafter in the National Wilderness Preservation System, including the Boundary Waters Canoe Area, Superior National Forest, except as that area is subject to § 293.16.

§ 293.2 Objectives.

Except as otherwise provided in the regulations in this part, National Forest Wilderness shall be so administered as to meet the public purposes of recreational, scenic, scientific, educational, conservation, and historical uses; and it shall also be administered for such other purposes for which it may have been established in such a manner as to preserve and protect its wilderness character. In carrying out such purposes, National Forest Wilderness resources shall be managed to promote, perpetuate, and, where necessary, restore the wilderness character of the land and its specific values of solitude, physical and mental challenge, scientific study, inspiration, and primitive recreation. To that end:

(a) Natural ecological succession will be allowed to operate freely to the extent feasible.

(b) Wilderness will be made available for human use to the optimum extent consistent with the maintenance of primitive conditions.

(c) In resolving conflicts in resource use, wilderness values will be dominant to the extent not limited by the Wilderness Act, subsequent establishing legislation, or the regulations in this part.

§ 293.3 Control of uses.

To the extent not limited by the Wilderness Act, subsequent legislation establishing a particular unit, or the regulations in this part, the Chief, Forest Service, may prescribe measures necessary to control fire, insects, and disease and measures which may be used in emergencies involving the health and safety of persons or damage to property and may require permits for, or otherwise limit or regulate, any use of National Forest land, including, but not limited to, camping, campfires, and grazing of recreation livestock.

§ 293.4 Maintenance of records.

The Chief, Forest Service, in accordance with section 3(a)(2) of the Wilderness Act, shall establish uniform procedures and standards for the maintenance and availability to the public of records pertaining to National Forest Wilderness, including maps and legal descriptions; copies of regulations governing Wilderness; and copies of public notices and reports submitted to Congress regarding pending additions, eliminations, or modifications. Copies of such information pertaining to National Forest Wilderness within their respective jurisdictions shall be available to the public in the appropriate offices of the Regional Foresters, Forest Supervisors, and Forest Rangers.

§ 293.5 Establishment, modification, or elimination.

National Forest Wilderness will be established, modified, or eliminated in accordance with the provisions of sections 3 (b), (d), and (e) of the Wilderness Act. The Chief, Forest Service, shall arrange for issuing public notices, appointing hearing officers, holding public hearings, and notifying the Governors of the States concerned and the governing board of each county in which the lands involved are located.

(a) At least 30 days' public notice shall be given of the proposed action and intent to hold a public hearing. Public notice shall include publication in the FEDERAL REGISTER and in a newspaper of general circulation in the vicinity of the land involved.

(b) Public hearings shall be held at locations convenient to the area affected. If the land involved is in more than one State, at least one hearing shall be held in each State in which a portion of the land lies.

(c) A record of the public hearing and the views submitted subsequent to public notice and prior to the close of the public hearing shall be included with any recommendations to the President and to the Congress with respect to any such action.

(d) At least 30 days before the date of the public hearing, suitable advice shall be furnished to the Governor of each State and the governing board of each county or, in Alaska, the borough

in which the lands are located, and Federal departments and agencies concerned; and such officers or Federal agencies shall be invited to submit their views on the proposed action at the hearing or in writing by not later than 30 days following the date of the hearing. Any views submitted in response to such advice with respect to any proposed Wilderness action shall be included with any recommendations to the President and to the Congress with respect to any such action.

§ 293.6 Commercial enterprises, roads, motor vehicles, motorized equipment, motorboats, aircraft, aircraft landing facilities, airdrops, structures, and cutting of trees.

Except as provided in the Wilderness Act, subsequent legislation establishing a particular Wilderness unit, or §§ 294.2 (b), 294.2(c), and 294.2(e), paragraphs (c) and (d) of this section, and §§ 293.7, 293.8, and 293.12 through 293.16, inclusive, and subject to existing rights, there shall be in National Forest Wilderness no commercial enterprises; no temporary or permanent roads; no aircraft landing strips; no heliports or helispots, no use of motor vehicles, motorized equipment, motorboats, or other forms of mechanical transport; no landing of aircraft; no dropping of materials, supplies, or persons from aircraft; no structures or installations; and no cutting of trees for nonwilderness purposes.

(a) "Mechanical transport," as herein used, shall include any contrivance which travels over ground, snow, or water on wheels, tracks, skids, or by floatation and is propelled by a nonliving power source contained or carried on or within the device.

(b) "Motorized equipment," as herein used, shall include any machine activated by a nonliving power source, except that small battery-powered, hand-carried devices such as flashlights, shavers, and Geiger counters are not classed as motorized equipment.

(c) The Chief, Forest Service, may authorize occupancy and use of National Forest land by officers, employees, agencies, or agents of the Federal, State, and county governments to carry out the purposes of the Wilderness Act and will prescribe conditions under which motorized equipment, mechanical transport, aircraft, aircraft landing strips, heliports, helispots, installations, or structures may be used, transported, or installed by the Forest Service and its agents and by other Federal, State, or county agencies or their agents, to meet the minimum requirements for authorized activities to protect and administer the Wilderness and its resources. The Chief may also prescribe the conditions under which such equipment, transport, aircraft, installations, or structures may be used in emergencies involving the health and safety of persons, damage to property, or other purposes.

(d) The Chief, Forest Service, may permit, subject to such restrictions as he deems desirable, the landing of aircraft and the use of motorboats at places within any Wilderness where these uses were established prior to the date the Wilderness was designated by Congress as a unit of the National Wilderness Preservation System. The Chief may also permit the maintenance of aircraft landing strips, heliports, or helispots which existed when the Wilderness was designated by Congress as a unit of the National Wilderness Preservation System.

§ 293.7 Grazing of livestock.

(a) The grazing of livestock, where such use was established before the date of legislation which includes an area in the National Wilderness Preservation System, shall be permitted to continue under the general regulations covering grazing of livestock on the National Forests and in accordance with special provisions covering grazing use in units of National Forest Wilderness which the Chief of the Forest Service may prescribe for general application in such units or may arrange to have prescribed for individual units.

(b) The Chief, Forest Service, may permit, subject to such conditions as he deems necessary, the maintenance, reconstruction, or relocation of those livestock management improvements and structures which existed within a Wilderness when it was incorporated into the National Wilderness Preservation System. Additional improvements or structures may be built when necessary to protect wilderness values.

§ 293.8 Permanent structures and commercial services.

Motels, summer homes, stores, resorts, organization camps, hunting and fishing lodges, electronic installations, and similar structures and uses are prohibited in National Forest Wilderness. The Chief, Forest Service, may permit temporary structures and commercial services within National Forest Wilderness to the extent necessary for realizing the recreational or other wilderness purposes, which may include, but are not limited to, the public services generally offered by packers, outfitters, and guides.

§ 293.9 Poisons and herbicides.

Poisons or herbicides will not be used to control wildlife, fish, insects, or plants within any Wilderness except by or under the direct supervision of the Forest Service or other agency designated by the Chief, Forest Service; however, the personal use of household-type insecticides by visitors to provide for health and sanitation is specifically excepted from this prohibition.

§ 293.10 Jurisdiction over wildlife and fish.

Nothing in the regulations in this part shall be construed as affecting the jurisdiction or responsibility of the several States with respect to wildlife and fish in the National Forests.

§ 293.11 Water rights.

Nothing in the regulations in this part constitutes an expressed or implied claim or denial on the part of the Department of Agriculture as to exemption from State water laws.

§ 293.12 Access to surrounded State and private lands.

States or persons, and their successors in interest, who own land completely surrounded by National Forest Wilderness shall be given such rights as may be necessary to assure adequate access to that land. "Adequate access" is defined as the combination of routes and modes of travel which will, as determined by the Forest Service, cause the least lasting impact on the primitive character of the land and at the same time will serve the reasonable purposes for which the State and private land is held or used. Access by routes or modes of travel not available to the general public under the regulations in this part shall be given by written authorization issued by the Forest Service. The authorization will prescribe the means and the routes of travel to and from the privately owned or State-owned land which constitute adequate access and the conditions reasonably necessary to preserve the National Forest Wilderness.

§ 293.13 Access to valid mining claims or valid occupancies.

Persons with valid mining claims or other valid occupancies wholly within National Forest Wilderness shall be permitted access to such surrounded claims or occupancies by means consistent with the preservation of National Forest Wilderness which have been or are being customarily used with respect to other such claims or occupancies surrounded by National Forest Wilderness. The Forest Service will, when appropriate, issue permits which shall prescribe the routes of travel to and from the surrounded claims or occupancies, the mode of travel, and other conditions reasonably necessary to preserve the National Forest Wilderness.

§ 293.14 Mining, mineral leases, and mineral permits.

Notwithstanding any other provisions of the regulations in this part, the U.S. mining laws and all laws pertaining to mineral leasing shall extend to each National Forest Wilderness for the period specified in the Wilderness Act or subsequent establishing legislation to the same extent they were applicable prior to the date the Wilderness was designated by Congress as a part of the National Wilderness Preservation System.

(a) Whoever hereafter locates a mining claim in National Forest Wilderness shall within 30 days thereafter file a written notice of his Post Office address and the location of that mining claim in the office of the Forest Supervisor or District Ranger having jurisdiction over the National Forest land on which the claim is located.

(b) Holders of unpatented mining claims validly established on any National Forest Wilderness prior to inclusion of such unit in the National Wilderness Preservation System shall be accorded the rights provided by the U.S. mining

laws as then applicable to the National Forest land involved. Persons locating mining claims in any unit of National Forest Wilderness on or after the date on which the said unit was included in the National Wilderness Preservation System shall be accorded the rights provided by the U.S. mining laws as applicable to the National Forest land involved and subject to provisions specified in the establishing legislation. All claimants shall comply with reasonable conditions prescribed by the Chief, Forest Service, for the protection of National Forest resources in accordance with the general purposes of maintaining the National Wilderness Preservation System unimpaired for future use and enjoyment as wilderness and so as to provide for the preservation of its wilderness character; and a performance bond may be required.

(1) Prior to commencing operation or development of any mining claim, or to cutting timber thereon, mining claimants shall file written notice in the office of the Forest Supervisor or District Ranger having jurisdiction over the land involved. Unless within 20 days after such notice is given the Forest Service requires the claimant to furnish operating plans or to accept a permit governing such operations, he may commence operation, development, or timber cutting.

(2) No claimant shall construct roads across National Forest Wilderness unless authorized by the Forest Service. Application to construct a road to a mining claim shall be filed with the Forest Service and shall be accompanied by a plat showing the location of the proposed road and by a description of the type and standard of the road. The Chief, Forest Service, shall, when appropriate, authorize construction of the road as proposed or shall require such changes in location and type and standard of construction as are necessary to safeguard the National Forest resources, including wilderness values, consistent with the use of the land for mineral location, exploration, development, drilling, and production and for transmission lines, waterlines, telephone lines, and processing operations, including, where essential, the use of mechanical transport, aircraft or motorized equipment.

(3) Claimants shall cut timber on mining claims within National Forest Wilderness only for the actual development of the claim or uses reasonably incident thereto. Any severance or removal of timber, other than severance or removal to provide clearance, shall be in accordance with sound principles of forest management and in such a manner as to minimize the adverse effect on the wilderness character of the land.

(4) All claimants shall, in developing and operating their mining claims, take those reasonable measures, including settling ponds, necessary for the disposal of tailings, dumpage, and other deleterious materials or substances to prevent obstruction, pollution, excessive siltation, or deterioration of the land, streams, ponds, lakes, or springs, as may be directed by the Forest Service.

(5) On mining claims validly established prior to inclusion of the land within the National Wilderness Preservation System, claimants shall, as directed by the Forest Service and if application for patent is not pending, take all reasonable measures to remove any improvements no longer needed for mining purposes and which were installed after the land was designated by Congress as Wilderness and, by appropriate treatment, restore, as nearly as practicable, the original contour of the surface of the land which was disturbed subsequent to the date this section is adopted and which is no longer needed in performing location, exploration, drilling, and production and promote its revegetation by natural means. On such part of the claim where restoration to approximately the original contour is not feasible, restoration for such part shall provide a combination of bank slopes and contour gradient conducive to soil stabilization and revegetation by natural means.

(6) On claims validly established after the date the land was included within the National Wilderness Preservation System, claimants shall, as directed by the Forest Service, take all reasonable measures to remove improvements no longer needed for mining purposes and, by appropriate treatment, restore, as near as practicable, the original contour of the surface of the land which was disturbed and which is no longer needed in performing location and exploration, drilling and production, and to revegetate and to otherwise prevent or control accelerated soil erosion.

(c) The title to timber on patented claims validly established after the land was included within the National Wilderness Preservation System remains in the United States, subject to a right to cut and use timber for mining purposes. So much of the mature timber may be cut and used as is needed in the extraction, removal, and beneficiation of the mineral deposits, if needed timber is not otherwise reasonably available. The cutting shall comply with the requirements for sound principles of forest management as defined by the National Forest rules and regulations and set forth in stipulations issued by the Chief, Forest Service, which as a minimum incorporate the following basic principles of forest management:

(1) Harvesting operations shall be so conducted as to minimize soil movement and damage from water runoff; and

(2) Slash shall be disposed of and other precautions shall be taken to minimize damage from forest insects, disease, and fire.

(d) Mineral leases, permits, and licenses covering lands within National Forest Wilderness will contain reasonable stipulations for the protection of the wilderness character of the land consistent with the use of the land for purposes for which they are leased, permitted, or licensed. The Chief, Forest Service, shall specify the conditions to be included in such stipulations.

(e) Permits shall not be issued for the removal of mineral materials commonly known as "common varieties" under the Materials Act of July 31, 1947, as amended and supplemented (30 U.S.C. 601–604).

§ 293.15 Prospecting for minerals and other resources.

The Chief, Forest Service, shall allow any activity, including prospecting, for the purpose of gathering information about minerals or other resources in National Forest Wilderness except that any such activity for gathering information shall be carried on in a manner compatible with the preservation of the wilderness environment, and except, further, that:

(a) No person shall have any right or interest in or to any mineral deposits which may be discovered through prospecting or other information-gathering activity after the legal date on which the United States mining laws and laws pertaining to mineral leasing cease to apply to the specific Wilderness, nor shall any person after such date have any preference in applying for a mineral lease, license, or permit.

(b) No overland motor vehicle or other form of mechanical overland transport may be used in connection with prospecting for minerals or any activity for the purpose of gathering information about minerals or other resources except as authorized by the Chief, Forest Service.

(c) Any person desiring to use motorized equipment, to land aircraft, or to make substantial excavations for mineral prospecting or for other purposes shall apply in writing to the office of the Forest Supervisor or District Ranger having jurisdiction over the land involved. Excavations shall be considered "substantial" which singularly or collectively exceed 200 cubic feet within any area which can be bounded by a rectangle containing 20 surface acres. Such use or excavation may be authorized by a permit issued by the Forest Service. Such permits may provide for the protection of National Forest resources, including wilderness values, protection of the public, and restoration of disturbed areas, including the posting of performance bonds.

(d) Prospecting for water resources and the establishment of new reservoirs, water-conservation works, power projects, transmission lines, and other facilities needed in the public interest and the subsequent maintenance of such facilities, all pursuant to section 4(d)(4)(1) of the Wilderness Act, will be permitted when and as authorized by the President.

§ 293.16 Special provisions governing the Boundary Waters Canoe Area, Superior National Forest.

Subject to existing private rights, the lands now owned or hereafter acquired by the United States within the Boundary Waters Canoe Area of the Superior National Forest, Minn., as formerly designated under Reg. U–3 (§ 294.1) and incorporated into the National Wilderness Preservation System under the

Wilderness Act of September 3, 1964, shall be administered in accordance with this regulation for the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the Area, particularly in the vicinity of lakes, streams, and portages.

(a) In the management of the timber resources of the Boundary Waters Canoe Area, two zones are established:

(1) An Interior Zone, in which there will be no commercial harvesting of timber. The boundaries of this zone are defined on an official map dated the same date as that on which this regulation is promulgated, which map shows the specific boundaries established January 12, 1965, and the boundaries of the additional area which is to be progressively added by the Chief of the Forest Service between January 12, 1965, and December 31, 1975.

(2) A Portal Zone which will include all the Boundary Waters Canoe Area not designated as Interior Zone. Timber harvesting is permitted in the Portal Zone under conditions designed to protect and maintain primitive recreational values. Timber within 400 feet of the shorelines of lakes and streams suitable for boat or canoe travel or any portage connecting such waters will be specifically excluded from harvesting, and timber harvesting operations will be designed to avoid unnecessary crossings of portages. Timber sale plans will incorporate suitable provisions for prompt and appropriate cover restoration.

(b) Except as provided in the Wilderness Act, in this section and in §§ 294.2 (b), (c) and (e), and subject to existing private rights, there shall be no commercial enterprises and no permanent roads within the Boundary Waters Canoe Area and there shall be no temporary roads, no use of motor vehicles, motorized equipment, or motorboats, no landing of aircraft, and no other form of mechanical transport.

(1) All uses that require the erection of permanent structures and all permanent structures except as herein provided, are prohibited in the Boundary Waters Canoe Area. The Chief, Forest Service, may permit temporary structures and commercial services within the Boundary Waters Canoe Area to the extent necessary for realizing the recreational or other wilderness purposes, which may include the public services generally offered by outfitters and guides.

(2) In the Portal Zone temporary roads and the use of motorized equipment and mechanical transport for the authorized travel and removal of forest products will be permitted in accordance with special conditions established by the Chief, Forest Service; but such use of the roads for other purposes is prohibited.

(3) The overland transportation of any watercraft by mechanical means, including the use of wheels, rollers, or other devices, is prohibited except that mechanical transport and necessary attendant facilities may be permitted, in accordance with special conditions established by the Chief, Forest Service, over portages along the International Boundary, including the Loon River Portage, when acquired; Beatty Portage and Prairie Portage; the other major portages into Basswood Lake; namely, Four Mile and Fall-Newton-Pipestone Bay Portages; and the Vermilion-Trout Lake Portage. Mechanical transport over Four Mile and Fall-Newton-Pipestone Bay Portages may be suspended, modified, or revoked upon acquisition by the United States of all lands on Basswood Lake, and the expiration of rights reserved in connection with the acquisition of such lands.

(4) No motor or other mechanical device capable of propelling a watercraft through water shall be transported by any means across National Forest land except over routes designated by the Chief, Forest Service, who shall cause a list and a map of all routes so designated, and any special conditions governing their use, to be maintained for public reference in the offices of the Regional Forester, the Forest Supervisor, and the Forest Rangers having jurisdiction.

(5) Except for holders of reserved rights, no watercraft, motor, mechanical device, or equipment not used in connection with a current visit may be stored on or moored to National Forest land and left unattended.

(6) No amphibious craft of any type and no watercraft designed for or used as floating living quarters shall be moored to, used on, or transported over National Forest land.

(7) The Chief, Forest Service, may permit the use of motor-driven ice and snow craft on routes over which motors may be transported, as authorized in subparagraph (4) of this paragraph; and over the Crane Lake-Little Vermilion Lake Winter Portage; and over the Saganaga Lake Winter Portage, in sections 18–19, T. 66 N., R. 4 W. The Chief shall cause a list and a map of routes over which use of ice and snow craft is permitted, and any special conditions governing their use, to be maintained for public reference in the offices of the Regional Forester, the Forest Supervisor, and the Forest Rangers having jurisdiction.

(8) In order to permit customary use of the Boundary Waters Canoe Area to continue pending a permanent solution to the change of water levels resulting from the failure of Prairie Portage Dam and notwithstanding the provisions of subparagraphs (3) and (5) of this paragraph until December 31, 1969, use of portage wheels to transport boats across the temporary portage between Moose Lake and Newfound Lake may be permitted, and permits may be issued for the storage of boats and related equipment in the vicinity of this temporary portage to the extent consistent with the operating practices of the permittees prior to the failure of Prairie Portage Dam as determined by the Forest Supervisor; and notwithstanding the provisions of subparagraph (1) of this paragraph, a structure to maintain normal water levels in Moose Lake is authorized.

(c) No permanent or semipermanent camp may be erected or used on National Forest land except as authorized in connection with a reserved right, or in the Portal Zone in connection with the harvest and removal of timber and other forest products.

(d) Public use of certain existing improvements within and adjacent to the boundaries of the Boundary Waters Canoe Area, to wit:

Road—sections 8, 9, 10, and 11, T. 61 N., R. 9 W.
Road and railroad—section 3, T. 61 N., R. 8 W.
Road and powerline—section 22, T. 64 N., R. 1 W.

is recognized and may continue, subject to general authority of the Chief, Forest Service, with respect to roads and public utility improvements, in accordance with the general purpose of maintaining without unnecessary restrictions on other uses, the primitive character of the Area.

(e) To the extent not limited by the Wilderness Act, the Chief, Forest Service, may prescribe measures necessary to control fire, insects, and disease; measures necessary to protect and administer the Area; measures which may be used in emergencies involving the health and safety of persons, or damage to property; and may require permits for, or otherwise limit or regulate, and use of National Forest land, including camping and campfires. The Chief may authorize occupancy and use of National Forest land by officers or agencies of the Federal Government, the State of Minnesota, and the Counties of St. Louis, Lake, and Cook, and will prescribe conditions under which motorized equipment, mechanical transport, or structures may be used, transported, or installed by the Forest Service and its agents and by other Federal, State, or County agencies, to meet the minimum requirements for protection and administration of the Area and its resources.

(f) Nothing in this regulation shall be construed as affecting the jurisdiction or responsibility of the State of Minnesota with respect to wildlife and fish in the National Forest.

(g) The State of Minnesota, other persons, and their successors in interest owning land completely surrounded by National Forest land shall be given such rights as may be necessary to assure adequate access to that land. Such rights may be recognized in stipulations entered into between the Forest Service and the private owner or State. Such stipulations may prescribe the means and the routes of travel to and from the privately owned or State land which constitute adequate access and any other conditions reasonably necessary for the preservation of the primitive conditions within the Boundary Waters Canoe Area.

(78 Stat. 890, 16 U.S.C. 1131–1136; 74 Stat. 215, 16 U.S.C. 528–531; 46 Stat. 1020, 16 U.S.C. 577–577c)

§ 293.17 National Forest Primitive Areas.

(a) Within those areas of National Forests classified as "Primitive" on the

effective date of the Wilderness Act, September 3, 1964, there shall be no roads or other provision for motorized transportation, no commercial timber cutting, and no occupancy under special-use permit for hotels, stores, resorts, summer homes, organization camps, hunting and fishing lodges, or similar uses: *Provided*, That existing roads over National Forest lands reserved from the public domain and roads necessary for the exercise of a statutory right of ingress and egress may be allowed under appropriate conditions determined by the Chief, Forest Service.

(b) Grazing of domestic livestock, development of water storage projects which do not involve road construction, and improvements necessary for the protection of the National Forests may be permitted, subject to such restrictions as the Chief, Forest Service, deems desirable. Within Primitive Areas, when the use is for other than administrative needs of the Forest Service, use by other Federal agencies when authorized by the Chief, and in emergencies, the landing of aircraft and the use of motorboats are prohibited on National Forest land or water unless such use by aircraft or motorboats has already become well established, the use of motor vehicles is prohibited, and the use of other motorized equipment is prohibited except as authorized by the Chief. These restrictions are not intended as limitations on statutory rights of ingress and egress or of prospecting, locating, and developing mineral resources.

(78 Stat. 890, 16 U.S.C. 1131-1136; 74 Stat. 215, 16 U.S.C. 528-531)

PART 294—SPECIAL AREAS

Sec.
294.1 Recreation areas.
294.2 Navigation of aircraft within airspace reservation over certain areas of Superior National Forest in Minnesota.

AUTHORITY: Sec. 1, 30 Stat. 35, as amended, 62 Stat. 100, sec. 1, 33 Stat. 628; 16 U.S.C. 551, 472, unless otherwise noted.

§ 294.1 Recreation areas.

Suitable areas of national forest land, other than wilderness or wild areas, which should be managed principally for recreation use may be given special classification as follows:

(a) Areas which should be managed principally for recreation use substantially in their natural condition and on which, in the discretion of the officer making the classification, certain other uses may or may not be permitted may be approved and classified by the Chief of the Forest Service or by such officers as he may designate if the particular area is less than 100,000 acres. Areas of 100,000 acres or more will be approved and classified by the Secretary of Agriculture.

(b) Areas which should be managed for public recreation requiring development and substantial improvements may be given special classification as public recreation areas. Areas in single tracts of not more than 160 acres may be approved and classified by the Chief of the Forest Service or by such officers as he may designate. Areas in excess of 160 acres will be classified by the Secretary of Agriculture. Classification hereunder may include areas used or selected to be used for the development and maintenance as camp grounds, picnic grounds, organization camps, resorts, public service sites (such as for restaurants, filling stations, stores, horse and boat liveries, garages, and similar types of public service accommodations), bathing beaches, winter sports areas, lodges, and similar facilities and appurtenant structures needed by the public to enjoy the recreation resources of the national forests. The boundaries of all areas so classified shall be clearly marked on the ground and notices of such classification shall be posted at conspicuous places thereon. Areas classified under this section shall thereby be set apart and reserved for public recreation use and such classification shall constitute a formal closing of the area to any use or occupancy inconsistent with the classification.

§ 294.2 Navigation of aircraft within airspace reservation over certain areas of Superior National Forest in Minnesota.

(a) *Description of areas.* Sections 294.2(b) to 294.2(f), inclusive, apply to those areas of land and water in the Counties of Cook, Lake, and St. Louis, State of Minnesota, within the exterior boundaries of the Superior National Forest, which have heretofore been designated by the Secretary of Agriculture as the Superior Roadless Area, the Little Indian Sioux Roadless Area, and the Caribou Roadless Area, respectively, and to the airspace over said areas and below the altitude of 4,000 feet above sea level. Said areas are more particularly described in the Executive order setting apart said airspace as an airspace reservation (E.O. 10092, Dec. 17, 1949; 3 CFR 1949 Supp.). Copies of said Executive order may be obtained on request from the Forest Supervisor, Superior National Forest, Duluth, Minnesota (hereinafter called "Forest Supervisor").

(b) *Emergency landing and rescue operations.* The pilot of any aircraft landing within any of said areas for reasons of emergency or for conducting rescue operations, shall inform the Forest Supervisor within seven days after the termination of the emergency or the completion of the rescue operation as to the date, place, and duration of landing, and the type and registration number of the aircraft.

(c) *Low flights.* Any person making a flight within said airspace reservation for reasons of safety or for conducting rescue operations shall inform the Forest Supervisor within seven days after the completion of the flight or the rescue operation as to the date, place, and duration of flight, and the type and registration number of the aircraft.

(d) *Permits.* Permits for the navigation of aircraft within said airspace reservation until January 1, 1952, for the purpose of direct travel to and from private lands within any of said areas will be issued by the Forest Supervisor to the pilot or owner of such lands whenever it is shown by the applicant to the satisfaction of the Forest Supervisor that air travel was a customary means of ingress to and egress from such lands prior to December 17, 1949. No person shall navigate an aircraft within said airspace reservation except as authorized by such permit or by the provisions of §§ 294.2(b), 294.2(c), and 294.2(e). Upon request of the Forest Supervisor the reports, records, and other information as to any flights made pursuant to such permits shall be made available, *Provided*, That no such request shall be made after October 31, 1957.

(e) *Official flights.* The provisions of §§ 294.2(b), 294.2(c), and 294.2(d) will not apply to flights made for conducting or assisting in the conduct of official business of the United States, the State of Minnesota or of Cook, St. Louis or Lake County, Minnesota.

(f) *Conformity with law.* Nothing in these regulations shall be construed as permitting the operation of aircraft contrary to the provisions of the Civil Aeronautics Act of 1938 (52 Stat. 973), as amended, or any rule, regulation or order issued thereunder.

PART 295—USE OF OFF-ROAD VEHICLES [RESERVED]

PARTS 296–299 [RESERVED]

[FR Doc.73-3703 Filed 3-2-73;8:45 am]

Title 46—Shipping

CHAPTER I—COAST GUARD, DEPARTMENT OF TRANSPORTATION

[CGD 72-149R]

SUBCHAPTER B—MERCHANT MARINE OFFICERS AND SEAMEN

PART 10—LICENSING OF OFFICERS AND MOTORBOAT OPERATORS AND REGISTRATION OF STAFF OFFICERS

SUBCHAPTER T—SMALL PASSENGER VESSELS (UNDER 100 GROSS TONS)

PART 187—LICENSING

Requirements for Original Licenses

The purpose of the regulations in this document is to relax the visual acuity requirements for an original license as a deck engineer, or radio officer, or as an operator licensed under Part 10 or 187 of Title 46, Code of Federal Regulations. This change also affects the physical requirements for an endorsement as seaman because the visual acuity requirements for:

(1) An able seaman are the same as for an original license as a deck officer (46 CFR 12.05-5(b));

(2) A qualified member of the engine department are the same as for an original license as an engineer (46 CFR 12.15-5(b)); and

(3) A tankerman are the same as for an original license as an engineer, except the color vision test is the same as required for a deck officer (46 CFR 12.20-3(b)).

These amendments were proposed in a notice of proposed rule making published in the March 1, 1972, issue of the FEDERAL REGISTER (37 FR 4292) and in the Marine Safety Council Public Hearing Agenda, dated March 27, 1972. The proposed amendments were identified as item 7 in the notice and the agenda. A supplemental notice of proposed rule making was published in the December 8, 1972, issue of the FEDERAL REGISTER (37 FR 26124) to advise the public that the relaxation of the visual acuity requirements proposed on March 1, 1972, would, by cross reference, also affect the requirements for applicants for endorsements as able seaman, qualified member of the engine department, and tankerman. The public was given 30 additional days in which to submit written comments on the original notice and the supplemental notice. Interested persons were also given the opportunity to make oral statements at the public hearing which was held on March 27, 1972, in Washington, D.C.

Nine written comments were received. Seven of these comments supported the proposal, five of which suggested even further relaxation of the requirements. One comment opposed the proposal and suggested that there should be no standards for corrected vision but a stricter standard for uncorrected vision. The final commenter requested additional information. No oral comments were made at the public hearing.

An applicant for an original license must pass a physical examination that includes an eye test. Present regulations provide a visual acuity standard and allow a relaxation by the Commandant of the standard when the circumstances of the case so warrant. Coast Guard records indicate that such relaxations have been granted.

A comparison of the Coast Guard visual acuity standards with similar standards of other Government agencies discloses that in some cases the standards for merchant marine personnel are the most stringent. Such stringency was considered necessary because:

(1) After the original merchant marine license is issued, there is no subsequent examination for visual acuity; (2) the license qualifies the holder for service at sea that is comparable to line duty in the armed services; and (3) the license authorizes service on smaller vessels where, especially in bad weather, undue reliance on eye glasses would be undesirable. However, in view of the technological advances made in navigational aids and the lack of statistics to indicate that poor vision has materially contributed to any marine casualty, some relaxation of the visual acuity requirements is justified.

Seven of the comments received approved the proposal, five of which proposed that the corrected vision requirements in the present regulations be retained. These commenters pointed out that technical advances in navigational aids have made the dependence on normal eyesight less important than in the past. In addition, the commenters agree that operators and officers have proven themselves capable of performing satisfactorily under the present requirements.

In view of the comments received, the propostd uncorrected vision requirements have been adopted but the corrected requirements of the present regulations have been retained. The present corrected vision requirements are as follows:

License	One eye	Other eye
Deck	20/20	20/40
Engineer	20/30	20/50
Motorboat operator	20/20	20/40
Radio officer	20/30	20/50

In consideration of the foregoing, Chapter I of Title 46, Code of Federal Regulations, is amended as follows:

1. By amending § 10.02–5(e) by revising subparagraph (5) and the first and second sentences of subparagraph (3) to read as follows:

§ 10.02–5 Requirements for original licenses.

* * * * *

(e) *Physical examination* * * *.

(3) For an original license as master, mate, or pilot, the applicant must have uncorrected vision of at least 20/100 in both eyes correctable to at least 20/20 in one eye and 20/40 in the other. * * *

* * * * *

(5) For an original license as engineer, the applicant must have uncorrected vision of at least 20/100 in both eyes correctable to at least 20/30 in one eye and 20/50 in the other.

* * * * *

2. By revising § 10.13–15(c) to read as follows:

§ 10.13–15 Physical examinations for original licenses.

* * * * *

(c) For an original license as radio officer, the applicant must have uncorrected vision of at least 20/100 in both eyes correctable to at least 20/30 in one eye and 20/50 in the other. An applicant for an original license who has monocular vision and has served as a radio operator on merchant vessels of the United States with such vision may be issued a license if:

(1) He complies with the sections of this part that apply to the rating he seeks; and

(2) The vision in his remaining eye is at least 20/30 uncorrected.

* * * * *

3. By amending § 10.20–7(a) by revising the first and second sentences of subparagraph (2) to read as follows:

§ 10.20–7 Physical examination requirements.

(a) * * *

(2) For an original license as motorboat operator, the applicant must have uncorrected vision of at least 20/100 in both eyes correctable to at least 20/20 in one eye and 20/40 in the other. * * *

* * * * *

4. By amending § 187.10–15 by revising the first and second sentences of paragraph (c) to read as follows:

§ 187.10–15 Physical examination.

* * * * *

(c) For an original license as operator the applicant must have uncorrected vision of at least 20/100 in both eyes correctable to at least 20/20 in one eye and 20/40 in the other. * * *

* * * * *

(R.S. 4405, as amended, R.S. 4462, R.S. 4438, as amended; sec. 3, 70 Stat. 152, sec. 12, 85 Stat. 217, sec. 6(b)(1), 80 Stat. 937; 46 U.S.C. 375, 416, 224, 390(b), 1461(e), 49 U.S.C. 1655(b)(1); 49 CFR 1.46 (b) and (o)(1))

Effective date. These amendments become effective April 4, 1973.

Dated: February 27, 1973.

C. R. BENDER,
Admiral, U.S. Coast Guard,
Commandant.

[FR Doc.73-4083 Filed 3-2-73;8:45 am]

Title 47—Telecommunication

CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION

[Docket No. 18651; FCC 73-220]

PART 1—PRACTICE AND PROCEDURE

PART 73—RADIO BROADCAST SERVICES

AM Station Assignment Standards and Relationship Between AM and FM Broadcast Services

Report and order. In the matter of amendment of Part 73 of the Commission's rules, regarding AM station assignment standards and the relationship between the AM and FM broadcast services, Docket No. 18651.

1. This matter concerns the adoption of new rules to govern the assignment of standard broadcast, or "AM" facilities, both new stations and major changes in existing facilities. The proceeding was begun by notice of proposed rule making and Memorandum Opinion and Order adopted September 4, 1969, FCC 69-960, 34 FR 14384 (Sept. 13, 1969), 17 R.R. 2d 1524. Previously, in July 1968, a "freeze" had been imposed on the acceptance of applications for new AM stations and major changes, pending the formulation, proposal and adoption of rules to govern this service in the future.[1] Comments and reply comments in response to the notice were filed until early April 1970.

[1] Report and Order adopted July 18, 1968, FCC 68-739, 33 FR 10343, 13 R.R. 2d 1667. The "freeze" applied to all new and major change applications except change applications required by circumstances beyond the applicant's control (e.g., inability to continue at its present transmitter site), applications which are mutually exclusive with AM renewal applications, applications necessary to comply with international commitments, and applications for Class IV power increases where new international agreements make them possible (the latter provision was relaxed somewhat in 1969 along with the notice). The "freeze" has been waived in a few cases.

I. CONSIDERATIONS UNDERLYING THE "FREEZE" AND NOTICE PROPOSAL

2. The 1968 "freeze" Report and Order expressed in substance the following considerations: Since the adoption of new and somewhat more restrictive rules in 1964 (Docket 15084), applications have continued to flow in, and, while they do not present problems of degradation of existing service through interference (one of the important objectives of the Docket 15084 was to adopt rules under which such degradation would be minimized), stations authorized pursuant to these rules have been less than successful in improving AM service generally in two important respects: Reduction of "unserved area" [2] and provision of first local outlets in communities of significant size (while a majority of the stations being authorized as of mid 1968 were first stations, the size of places to which they were assigned was quite small, with a median population of 2,850). Also, since virtually all of the applications recently granted were for daytime-only facilities, they do nothing to improve service at night, where the really substantial unserved area exists. The Report and Order stated that this situation necessitated a study to determine whether there is still a significant national need for new AM stations or for major changes in existing stations, except in underserved areas, whether the remaining frequency space should be conserved for developing areas or to eradicate "unserved area", whether any future allocation system should view AM and FM as a single aural service, and whether the traditional "demand" basis of AM assignments is an efficient use of spectrum space. Since a continuing flood of applications would frustrate the objectives of the forthcoming rule making, on these basic questions, the "freeze" was adopted.

3. The September 1969 notice herein expressed these concepts in more concrete form. A quite restrictive rule was proposed, which would have prohibited the filing of applications for new stations unless the proposed operation would provide a first primary aural service to 25 percent of the area or population within the proposed primary service contour, and, if the application were for changed facilities, the area or population for which the station provided the only service would be increased. In determining the extent of present aural service, signals from existing FM stations of 1 mv./m. or greater would be taken into account.[3] Also, a test of FM channel availability would be included with respect to applications for new AM stations or new nighttime facilities (though not for changes in facilities on the same frequency): the AM application would not be accepted if there is available in the community an FM channel which the applicant could use and achieve substantially the same coverage of unserved area. This would include unoccupied FM channels assigned to the community in the FM Table of Assignments (§ 73.202 of the rules), unoccupied and available for use in the community because of assignment at a nearby community (§ 73.203 (b), the "10-mile" or "15-mile" rule), or susceptible of assignment in a reasonably simple rule-making proceeding involving no other changes in the Table.[4]

4. It was recognized that these very restrictive tests would sharply curtail the flow of applications, and, indeed, this was one of the express purposes of the proposal: To prevent the large-scale depletion of the limited AM spectrum space remaining until a more near optimum plan for utilizing it can be arrived at. It was emphasized (notice, para. 29) that the proposed rules "are not necessarily those which will govern the acceptance of applications for new and increased AM facilities for the indefinite future," but their adoption would give the Commission time to evaluate the over-all picture of aural development and to stimulate FM, with a further look at these developments in a few years. Meantime, we would authorize only stations clearly designed to improve service substantially.

5. The notice also emphasized certain other considerations, including the importance of stimulating FM development. It was stated that FM provides a superior service in a number of ways—full-time as opposed to the daytime-only service contemplated by the great majority of AM applications, usually a wider and more reliable service than a nighttime AM operation will provide, a service otherwise technically superior, with stereo and SCA potential—as well as being cheaper for the Commission to authorize and, except as compared to Class IV stations, cheaper for applicants to design and construct (AM directional antennas are expensive to design, evaluate, build and "prove out"). The notice also referred to the same consideration mentioned in the "freeze" Report and Order as to the relatively small contribution which current AM grants appear to be making to the improvement of aural service generally, nearly all of them representing daytime facilities with their inherent limitations, providing first or second local outlets in many cases but often only to very small communities (with most places of substantial size already having them). It was stated that while the provision of "first local outlets" is still of importance, "in our judgment it does not warrant, in itself, acceptance in the near future of applications providing no other substantial service benefit." (Notice, para. 31.) It was also pointed out that large-scale grant of applications for daytime-only facilities tends to preclude use of the channel and adjacent channels for full-time operations, which would bring service generally much more needed. With respect to increases in nighttime facilities—which have not up to now been subject to a "25 percent unserved area" test—it was stated that while these are sought on the ground that they are needed to cover expanding urban areas at night, often this is an excuse to propose facilities serving areas well removed from the station's city. (Notice, para. 19.)

6. The Notice also discussed certain subjects which the Commission hopes to explore in the course of its evaluation of the total AM picture. These included: (1) The possibility of requiring, in AM, a "preclusion showing", somewhat similar to that required with many petitions for additional FM assignments, showing what uses of the channel and adjacent channels would be precluded by the proposal, and what other assignment possibilities exist to meet such future needs and uses; and (2) the possible formulation of rules designed to cut down the tremendously burdensome and expensive work involved in the processing of AM applications, for example a rule to the effect that when one application providing certain service benefits has been accepted (e.g., one which would serve unserved area or provide a first local outlet), no other conflicting application would be accepted unless it would provide at least as great benefits. The notice also invited comments on some alternative approaches in various respects (notice, para. 33(a) to (e)): Attaching more importance to providing a second service as well as a first; possibly requiring service to only a smaller percentage of "unserved area"; provision of first or second local outlets as well as a first or second primary service, ways of avoiding intentionally inefficient proposals designed to meet the "25 percent" test simply by serving an unduly limited area; and possible exclusion of "distant" signals in determining whether an area is presently served, on the theory that service from a distant source, while it may be technically good, is not equal to a closer service in being meaningful to listeners.

II. A BRIEF HISTORY OF AM ALLOCATION RULES

7. Historically, and at present, except to the extent the "freeze" prevails, AM applications have been accepted and considered on a "demand" basis: an applicant chooses and proposes a particular

[2] The term "unserved" where used herein means area or population not receiving AM primary service, daytime or nighttime as the case may be. The term "white area", used traditionally and in the Notice to express this concept, has been confusing at times, and therefore is not used herein, "unserved area" meaning the same thing. We are retaining the traditional term "gray" to refer to area or population receiving only one primary service, since the only other likely expression, "underserved", is not sufficiently precise.

[3] The proposed rule itself would not have included in this criterion service from noncommercial educational stations, although comments on this were invited. The 25 percent "unserved area" test would relate to daytime area where the AM application is for daytime facilities, either daytime or nighttime area where the application is for a new Class IV station, and otherwise to nighttime area.

[4] Thus, the criteria involving FM actually were two separate tests: The present existence of FM service, and the availability of an unoccupied FM channel. Some commenting parties confused the two, as discussed below.

community, frequency, power and directional or nondirectional mode of operation, and his application is evaluated on this basis. Assuming he is qualified in non-technical respects, and his application does not involve objectionable interference to other stations or receive objectionable interference to an extent prohibited by the rules, it is granted. In general, no consideration is given to other possible uses of the channel (or of adjacent channels) in the area, or to other possible frequencies, powers or directional modes which the applicant could employ and which might represent a more efficient allocation. This contrasts sharply with the approach used in assigning "commercial" FM and all television stations. In these services, channel assignments are listed in Tables of assignments (§§ 73.202 for FM and 73.606 for TV), one or more assignments being listed for these communities throughout the United States. An applicant must apply for one of these assignments, either for a station in the listed community or for an unlisted community within a short distance.[5] These assignments have been made, and must be used, on the basis of minimum mileage separations between stations on the same and adjacent channels (e.g., in "Zone I", the Northeast, 170 miles co-channel for VHF TV and 155 miles for UHF TV, 150 miles for Class B FM stations and 65 miles for Class A FM stations). These separations are based on the assumption that all stations operate with maximum facilities and, on that assumption and given interference ratios, are designed to afford stations a reasonably large interference-free coverage area. Directional antennas are not used in TV and FM as an assignment tool, although they are used by a number of stations to increase signal strength in certain directions and avoid wasting coverage in others (e.g., over water). The preengineered tables of assignments are designed both to provide for an adequate number of channels in each community and area, and a high degree of efficiency of channel usage.

8. This planned approach has two great advantages over the "demand" system: it permits the reservation of channels to meet anticipated future needs and developments rather than allowing immediate demand to determine the disposition of spectrum space; and, by assuming maximum facilities, it permits stations to increase their facilities in an orderly fashion even where they start modestly. In AM, by contrast, stations are often "squeezed in," the assignment being made possible only by a combination of minimum power and, sometimes, a rather elaborate directional antenna intended to minimize interference to other stations; this presents problems when the station later wishes to increase its facilities. On the other hand, the AM approach obviously has a great deal more flexibility, and probably permits assignments in more places than are possible under the other system.

9. *Changes adopted in 1964 for AM assignments.* Prior to 1964, AM assignments were made on the basis of "normally protected" contours; an applicant's proposal would be accepted and considered even if it involved some "objectionable interference," as defined in the rules, to existing stations, and if that was the case, a hearing was normally required in which the service gains and the interference detriment could be weighed (§ 73.24(b) which still applies to applications which were filed before the adoption of the new rules). The rules (§ 73.28(d), adopted in 1954 to replace and modify the earlier engineering standards),[6] also provided a test to insure that an operation would either be a reasonably efficient one or one providing a significant service benefit: The so-called "10-percent rule," to the effect that a proposal must either provide interference-free service to at least 90 percent of the population within its normally protected contour, or, for nighttime operation, that the station must either be a first local nighttime AM outlet or provide a first primary service to 25 percent of the area within its interference-free contour.

10. Following a "freeze" adopted in May 1962, the Commission in 1963 proposed tighter rules to govern the consideration of new and increased AM facilities (Docket 15084). These were adopted pretty much as proposed, in July 1964. The chief changes involved were three: (1) The previous concept of a "normally protected contour," which could be invaded by a proposed new or increased operation if the gain would outweigh the loss, was replaced by a strict "go-no-go" principle, embodied in § 73.37, making the application unacceptable if it would cause interference to other stations within their protected contours; (2) the test as to "interference received" was also made "go-no-go" and tightened somewhat as compared to the "10-percent rule" mentioned; a proposed station must not receive any interference within their protected contours, unless it was either a first local outlet (in a community outside an urbanized area, or of 25,000 or more population within an urbanized area), or would provide a first primary service to 25 percent of the area within the interference-free contour, in which case interference might be received up to the 1 mv./m. contour; and (3) the 25 percent "unserved area" test was made an absolute condition to the acceptance of any application for new nighttime facilities (a new full-time station or a daytimer seeking full-time operation), though not for increases in such facilities.[7]

11. Probably the chief purpose of the 1964 rules was to prevent the deterioration of existing service through a series of grants of applications involving some interference to existing stations, each in itself small but cumulatively significant. As noted in the 1968 "freeze" Report and Order mentioned above, in this respect the new rules have been successful, although in other respects perhaps less so. The imposition of a "25 percent unserved area" requirement as an absolute criterion for new nighttime facilities was a recognition of the fact that any new nighttime operation is a source of interference to other cochannel stations over long distances, even though under the "R.S.S." method of computation, applying the "50 percent exclusion" rule, it may not be counted as objectionable interference.[8] Therefore, it was believed, rather than tighten the interference-computation rules to a point where virtually no additional facilities could be sought, it would be better to leave the computation rules as they are, and, instead, provide that, to justify the small incremental interference, a really substantial benefit be provided by the new proposal.

12. *The "clear channel freezes."* Another aspect of recent AM history, referred to by a number of commenting parties, is the "freeze" on the 25 I–A and some other channels, which has existed in one form or another since 1946. Section 73.25(a) presently in effect imposes a "freeze" to these channels, which have the 25 dominant I–A stations, plus 12 authorized full-time stations in the conterminous 48 States (10 II–A stations plus one at San Diego and one at Albuquerque), and 57 daytime-only or limited-time secondary stations, all authorized before 1946 (there are also some secondary stations in Alaska, Hawaii, and Puerto Rico on these channels). Also partially "frozen," in order to protect future allocation possibilities on the I–A channels, are 26 other channels adjacent to I–A frequencies.[9]

13. The "II–A" assignments mentioned in the last paragraph represent the one departure, in the AM field, from the "demand" principle. They date from the clear-channel decision of 1961 (in Docket 6741), in which the Commission "broke down" 13 of the I–A channels, to a limited extent, providing for one additional full-time assignment on each. Two of these were existing stations in San Diego, Calif., and Anchorage, Alaska; 11 others were for new Class II–A assignments specified in § 73.21 of the rules, to be used in a specified State

[5] In FM, a Class A channel may be used at an unlisted community within 10 miles of the listed community and a Class B/C channel at a community within 15 miles; the distance in television is 15 miles (§§ 73.203(b) and 73.607(b)).

[6] This rule, also, still applies to applications on file before adoption of the 1964 rules.

[7] In 1968 this 25 percent test was modified to permit acceptance where a first primary service would be provided to 25 percent of the area or population to be served.

[8] See § 73.182(o).

[9] These frequencies are specified in § 1.569, adopted in 1962 following the clear-channel decision. That section lists 33 frequencies, within 3 channels of a I–A channel. However, 7 of these have in effect been unfrozen now that all of the II–A assignments except that on 890 kH/s have been authorized. The extent to which the other 26 channels are "frozen" varies with the channel; on some the restraint is very small, but on some it is quite large (e.g. 630 kc/s, to protect the "higher power" potential of both the 640 and 650 kHz I–A stations).

or group of States (one in the Plains States and 10 in the West). All but one of these, the 890 kHz assignment in Utah, have now been authorized.

14. It should also be noted that liberal assignment principles for Alaska were adopted at the time of the notice herein; these have apparently worked well and no comments on the subject were filed in this proceeding. At the same time as the notice, the "freeze" was also lifted to permit the filing of power increase applications by the few Class IV stations not now having maximum power; this is discussed below.

III. Comments Filed in This Proceeding

15. Some 94 parties filed formal comments herein (counting individually about a dozen parties joining in certain comments). There were also some informal letters received. (Commenting parties are listed in Appendix B hereto.[11]) Of the parties filing formally, nearly all opposed the notice proposal partly or entirely; the closest to total support came from Clear Channel Broadcasting Service (CCBS), a group of 12 Class I–A licensees, as discussed below. There was particular opposition from licensees, engineers, and others, to the restrictions proposed on modifications of existing facilities (or "improvements").[12] Some parties, such as Association on Broadcasting Standards, Inc. (ABS, a full-time station group) took the position that the tight restrictions proposed for new stations are justified, but not those on increases in facilities. More than half of the comments dealt entirely, or largely, with the proposed restrictions on improvements in facilities. To a large extent, some of these parties' objections have been met by a subsequent (1970) Commission pronouncement clarifying the type of modification applications which are considered "major" and "minor" changes (i.e., applications proposing only changes in transmitter location, or directional or nondirectional mode of operation, are normally considered "minor"); but their arguments still must be considered in connection with other types of modification which are definitely "major": increases in power, changes in frequency, and applications by daytime-only stations for nighttime facilities.[13]

We do not attempt herein to discuss all of the comments individually; the following discussion will indicate the main lines of argument.

16. *Views of industry groups.* Six industry groups filed comments, including CCBS and ABS (mentioned above), National Association of Broadcasters (NAB), National Association of FM Broadcasters (NAFMB), Community Broadcasters Association (a group of Class IV stations), and the Association of Federal Communications Consulting Engineers (AFCCE). As indicated above, CCBS was the closest of all parties to supporting the notice proposal entirely. It favored the proposed restrictions particularly as to new stations, as avoiding further overcrowding of the AM band and encouraging FM, which, now that FM set circulation is large, should definitely be included in any "unserved area" determination and should be relied on to fill the need for additional stations. It is also urged that the Commission take steps to "clear" as many as 40 AM channels for higher power Class I operations, or national and regional stations, by reallocating stations engaged primarily in local broadcasting to the FM band.[14] CCBS also asserts that the "25 percent" standard should be tightened to require that 25 percent of the area and population be "unserved," citing in this connection the case of some of the II–A stations authorized, which serve large areas but small populations having no other nighttime primary service. CCBS also opposed any idea that, in making "unserved area" determination, distant signals should be ignored; it asserted that any mileage test of this sort would be arbitrary and its Class I members feel obligated to, and do, render truly meaningful service to rural areas many miles away from their locations. CCBS also renews its oft-made plea for "higher power" for the I–A stations, at least on an experimental basis, urging that skywave service is really the only way to provide good AM service to the present "unserved areas" in substantial amount, and that the present 50 kw. level is not sufficient to do so, in view of increasing man-made noise, interference from Latin American stations, and the poor selectivity of present transistor radios.

17. ABS agreed with the notice's view as to the desirability of restricting new facilities to those substantially serving "unserved area," saying that in this respect an "unrestricted demand" system is not justifiable, since it inevitably leads to a concentration of stations in and around large cities where there is a high level of economic support (often in "suburban" communities because of the more or less automatic "307(b)" preference which such stations receive despite the many outside signals available, and even though such proposals often present problems as to whether they are really not for large-city stations in fact if not in name). Thus, any AM stations to be permitted from now on should provide service where it is needed. Thus, it supported generally, for new stations, the "25 percent" standard. On the other hand, ABS vigorously opposed the restriction proposed on improvements in facilities, asserting that this would prevent stations making changes necessary to adequately serve their rapidly growing metropolitan areas, and thus improve the quality of existing service (this point is discussed separately below). It is asserted that if such restrictions are adopted, AM broadcasting will sink into obsolescence.[15] ABS also raised certain specific points: (1) Where existing FM service is to be considered in relation to "unserved area," probably it should be on the basis of such service to 100 percent of the area instead of 75 percent; otherwise, some "unserved area" would still remain; (2) educational FM stations should be included in this determination, since they do render service; (3) including in the FM availability test "unassigned but assignable" channels may present serious administrative problems; (4) there should not be an exception for proposals competing with renewals, since (with other new facilities not available) this would simply encourage such activity and this is particularly bad since the new applicant could propose greater facilities whereas the existing station could not;[16] (5) any consideration of "across the board" power increases, urged by some other parties, is much too complex for consideration at this time (involving both international and domestic problems); and (6) any consideration of permitting assignments which would provide a second primary service, or a first or second local service, should be only on a waiver basis, or otherwise the whole purpose of the rule would be thwarted (it is pointed out that many, probably most, recent and pending new applications are for a first or second station in their communities. It was urged that no such blanket restrictions are justifiable and that increases should simply be subject to the usual "no interference" tests.

18. NAB's comments related entirely to the proposed restriction on facility improvements, which, it points out, in some parts of the country would completely "freeze" AM stations at their

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[11] The term "improvement" in facilities is used herein, as it was by some of the commenting parties, to include all of the types of modification mentioned in the text, both "major" and "minor": changes in transmitter site, directional or nondirectional mode of operation, power increases, changes in frequency, and new nighttime facilities for daytime stations. Another type of "change" mentioned by a few parties—change in station location (community of license)—falls into a different category, being in a sense an application for a new facilities.

[12] Filed as part of the original document.

[13] See Policy Statement Concerning Standard Broadcast Applications for Major and Minor Changes, FCC 70–260, FCC 2d, 18 R.R. 2d 1763 (Apr. 14, 1970).

[14] CCBS cites, in this connection, the views expressed in the 1964 Report on Radio Spectrum Utilization issued by the Joint Technical Advisory Committee (JTAC), to the effect that in view of the crowded condition of the AM band in the United States and elsewhere, it would be in the long-range public interest to move local broadcasting (as opposed to national and regional) to the FM band, which is better suited for it because it offers superior technical characteristics, more consistent coverage, and better interference protection.

[15] This type of argument was urged also by several other parties, to the effect that with both other communications media and AM in other nations developing rapidly, it is not appropriate to restrict improvements in U.S. AM service.

[16] A number of existing licensees made one or both of these points in their comments, particularly the second.

present levels (e.g., North Carolina, where all but a very small part of the State receives 1 mv./m. or better FM service from existing FM stations). NAFMB,[16] as might be expected, supported the proposed inclusion of FM in the determination of what is "unserved area" and the concept that a new applicant should look first to FM, and in general treating that service as an integral part of a total aural service. It was asserted that both AM and FM are needed if the Nation is to receive adequate radio service—AM for its extensive groundwave and skywave coverage potential—and that too many substandard AM operations have been authorized (because FM has lagged) and this has hurt the development of FM. In sum, NAFMB supported the proposal as to new stations, and urged us to proceed with the type of reallocation recommended by JTAC (footnote 12, above). On the other hand, in its reply comments it expressed opposition to the proposed restrictions on improvements in existing stations, urging that effective AM service is needed, to rapidly burgeoning urban areas. This, it was said, should be looked at on a case-by-case basis.

19. The AFCCE comments opposed the idea of an "unserved area" criterion, or, indeed, any restriction beyond the overlap standards (adopted in 1964) to prevent objectionable interference, which, it stated, have worked well. It was stated that channel usage is going to be largely determined by presently existing stations in any event, so that no additional restrictions at this point are warranted. It was asserted that demand should determine what is possible, and the real needs for radio service do not really relate to "unserved area".[17] It was also urged that FM should not be taken into account, for reasons discussed separately below; and AFCCE made some specific suggestions also mentioned below. The comments of the Community Broadcasters Association related entirely to the 1-year limitation adopted in 1969 on the filing of applications by Class IV stations for power increases (only a few had not previously applied), urging that such a deadline should not be set.

20. *Other general comments.* A number of other comments generally opposing the proposal—which is claimed to represent a near-total "freeze"—were filed, which advanced among them in various forms the following views and ideas (some of which have been indicated above).[18]

21. *The great need for increased facilities.* It is urged that there is a tremendous general need to increase facilities (as noted, some of the arguments on this score, but not all, have been rendered moot by the 1970 pronouncement concerning major and minor changes). This is said to be true because of: (1) The great and rapid increase in the size of urban areas, which make more power or changed transmitter locations necessary to serve them and which will continue for a long time; (2) the unsuitability or future unavailability of present transmitter sites, because of the building up of surrounding areas (with reradiation problems), freeway construction or urban renewal, requiring relocation and, often, a power increase from the new location to continue to serve the whole urban area adequately; (3) increased manmade noise levels; (4) the need to correct antiquated directional arrays. Many parties also urge the need for nighttime service by daytime-only stations, which is discussed below in connection with three particular comments by such licensees.

22. *Nighttime interference levels have not increased and will not increase if new nighttime facilities are permitted.* One of the key concepts in the restrictions adopted by the Commission in 1964 on new nighttime authorizations was that any new nighttime operation is a source of additional interference to cochannel stations, even though—under the "50 percent exclusion" concept embodied in § 73.182(o)—it does not increase the nighttime limit of any station enough to be cognizable under the rules as "objectionable interference." Many parties, particularly engineering, argued with this idea. It was asserted that while some interference is thus added, it is minuscule and insignificant. In this connection reference was made to a study sponsored by the NAB in 1962 (prepared by George Davis), concerning interference levels on certain channels in 1960 as compared to 1940. It was found in the study that, despite a tremendously increased number of stations and virtual elimination of "unserved" and "gray" daytime area in the Southeast, the nighttime limits of many stations on these channels had increased little or none, and in some cases had been reduced as stations directionalized their nighttime operations.[19]

Attention was also called to the KWK (St. Louis) situation, where, when that license was not renewed and multiple new applicants competed for the frequency, the result was a substantial improvement in the service areas of nine cochannel stations. Some of the parties urging this point claimed that the impression of increased nighttime interference is basically a subjective, psychological one resulting from two factors: (1) With the movement to the suburbs, a listener may well now live outside of his local station's interference-free nighttime contour, and thus experience interference, whereas if he had remained in his earlier in-city location he would find no more now than formerly; and (2) tuning across the band at night today, the listener may encounter many fairly new stations, with high interference limits, in places on the dial where 30 years ago there was only silence; but the stations which were there then can still be received just as well.

23. On this basis, a number of parties urged not only that no restrictions be imposed here on nighttime authorizations, but that the "25 percent unserved area" criterion adopted in 1964 for new nighttime operations be abandoned. It was claimed that this, not any reluctance of parties to establish new nighttime facilities, is the reason why very few such proposals have been advanced in recent years; correspondingly, if the restriction were removed, needed expansion of nighttime service would result. It was also asserted that this restriction is undesirable in presenting a choice of nighttime local services and attainment of competitive equality.

24. *Emphasizing "unserved area" at the expense of other needs.* Many parties urged that the emphasis on "unserved area" embodied in the notice is both useless and wrong, pursuing an impossible objective at the expense of other needs for increased service. It was urged that: (1) There simply is not and will not be economic support in these areas for stations in any number sufficient to make a substantial dent in the "unserved area" (day or night); (2) the granting of new or increased facilities in other parts of the country, at least daytime, will not generally have any significant preclusionary effect on later facilities serving "unserved area" if and when there is any demand for them (or, at least, that this could be handled on a case-by-case basis by way of a "preclusion study"); (3) the most likely way to serve some of this "unserved area" is permitting increased facilities for existing stations, which would also tremendously improve their coverage of their own urban areas; (4) this emphasis, which includes "service" from distant sources, ignors the tremendous need for and importance of local service, a key objective of the Commission for many years under section 307(b) of the Communications Act; (5) it also ignores the importance of a choice of service—at least two, and likely more—and thus tends to preserve monopoly and diminish competition, for example in a number of cities of over 25,000 pop-

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[16] The NAFMB is composed of FM broadcasters, some independent and some also licensees of companion AM stations.

[17] AFCCE used as an example Ventura County, Calif., which has had a tremendous growth in recent years, with new cities of large size, but where the availability of AM facilities is sharply limited by the numerous Los Angeles stations. It was stated that, while these stations provide it with signals and thus it is not 'unserved area", it is doubtful that they can do much to meet its particular needs, since the needs of that city itself are great enough.

[18] The comments chiefly dealt with in these paragraphs are those of McKenna and Wilkinson and Robert L. Booth, Esq., communications attorneys, and the following communications engineering firms: Ralph J. Bitzer, Jules Cohen and Associates, Cohen & Dipell, Commercial Radio Equipment Co., Peter J. Guerckis (John Mullaney & Associates), Vir James, Jansky and Bailey, L. J. du Treil, Robert L. Jones, George Lohnes (Lohnes & Culver), E. Harold Munn, Silliman, Moffatt & Kowalski, Carl Smith, A. Earl Cullum & Associates, and J. G. Rountree.

[19] In the same inquiry, NBC made a study of the 1941 and 1962 limits of 3 Washington, D.C., stations, including its own WRC, computed by the 50 percent RSS exclusion method. It showed two as declining (2.8 to 2.6 mv./m. and 2.6 to 2.3 mv./m.) and WRC increasing, 3.5 to 3.6 mv./m. NBC also carried the analysis of WRC's limits out on the basis of 10 percent exclusion and found limits of 4.3 mv./m. in 1941 and 4.7 mv./m. in 1962.

ulation (outside of urban areas) having only 1 station; (6) there are other pressing needs much more likely of fulfillment, including that for adequate coverage of burgeoning urban areas and shifting populations, for local outlets in "new towns" such as Columbia, Md. (projected to have a population of over 100,000 by 1980), outlets for minority groups, and greater service generally to fulfill the specialized, localized role of modern radio."

25. *The significance of FM.* While NAFMB and a few other parties supported the notice's treatment of FM, many parties vigorously opposed it. Their arguments included the following: (1) It is essentially immoral to create an "artificial shortage" in AM just to stimulate FM; rather, the people of the area involved, and applicants proposing to serve them, should have a choice as to which they wish to use; (2) FM does not need any stimulation, shown by the great increase in stations between 1962 and 1969 (nearly 60 percent) and the occupancy of all or nearly all channels in much of the country including areas around large cities; (3) FM is still not the equivalent of AM in ability to serve the public, in view of limited set circulation and particularly the absence of FM sets in automobiles during highly important "drive time"; (4) terrain problems in rough or mountainous areas which seriously limit FM service range in some cases; (5) the very limited extent to which FM channels are in fact available, in much of the country, for a potential applicant to use; (6) the utter impossibility of establishing a viable FM station in some parts of the country where its has not developed at all outside of large centers (e.g., Wyoming, with the only stations those in Casper and Cheyenne, and northern Maine); (7) FM is not cheaper than AM as the notice claimed, but in fact AM is less expensive even if it involves a simple directional array (parties gave various figures in this connection). It was urged that—with only 25 percent of assigned channels vacant as of the end of 1969, and only 13 percent east of the Mississippi—telling potential applicants to "look to FM" is largely illusory, and, also, that any concept of using "unassigned by assignable" channels in this connection is an administrative impossibility and grossly unfair to applicants, in view of the delays and problems involved in FM rule making; (8) FM and AM are and should be treated as complementary, each being used where it best serves.

26. *Whether there is an "AM shortage".* Many parties argued with the concept that there is in fact any shortage of AM spectrum space, as the notice indicated. It was claimed that, in much of the country away from urban centers, this is not true even under present assignment policies, and it is certainly not true in view of the potential for further assignments if and when the various clear channel "freezes" are lifted. For example, it is said, the 25 Class I–A channels represent nearly 25 percent of AM spectrum space, which could be made available for daytime, if not full time, stations; and the same is true of adjacent channels which are likewise partially "frozen" under § 1.569, and to some extent other channels (I–B frequencies) which were unfrozen earlier only to have the general 1962 "freeze" quickly superimposed on them. In any event, it was urged, this reservoir makes it inappropriate to impose a freeze such as that involved in the notice proposal. Rather, it was said, AM is really as available as FM, if not more so, and therefore a concept of looking to FM in order to avoid depletion of AM is basically fallacious.

27. *The Commission's role and obligation.* A number of parties claimed that the notice proposal, and sharp restrictions involved, really reflected the Commission's effort to further "administrative convenience" by simply chocking off applications. It was asserted that, while there are problems in AM processing and determination, they certainly do not warrant this approach, but, rather, efforts to deal with them as such. Some suggestions made are set forth below. It was also claimed (e.g., in the McKenna and Wilkinson comments) that these are largely of the Commission's own making, and the context of some court decisions such as Ashbacker and KOA, which have imposed substantial requirements.[21] For example, it was argued that the Commission for a long time made substandard, interference-causing AM grants as a matter of policy, and existing stations, realizing this, asserted their KOA hearing rights in every case even where the interference was minuscule, lest the grant become a precedent and also because the Commission's consideration did not take into account the cumulative effect of such impingements on a given existing station. Also, some parties urged that the assertedly erratic treatment of AM over the years—"freezes", thaws, and then "re-freezes"—created uncertainty and a pent-up demand, which resulted in the filing of numerous applications involving "chain reaction" conflicts, particularly when certain frequencies were unfrozen. In general, it was urged that the Commission cannot properly use these considerations as ground to support the near-total "freeze" contemplated by the notice, but must do the best it can to improve its procedures and seek the necessary additional staff to handle applications which reflect a genuine demand and therefore, in general, applications which reflect a genuine demand and therefore, in general a need. In this connection, two other points were also urged: (1) While the notice spoke generally of the proposal as an interim measure pending further in-depth study, there was nothing specific as to what would be studied or when, so that it must be assumed the near-total freeze would last indefinitely; (2) some parties accused the Commission of having in mind, without saying so, a form of "birth control", an idea that a given community or area simply does not need, or cannot well support, any more stations than it now has.

28. *"Foreign preemption".* A number of parties, particularly engineers, urged that any restrictions on U.S. AM assignments—beyond those necessary to avoid interference—are undesirable because foreign nations on the continent are not bound by such restrictions and will make use of the frequencies in places near the border, to the exclusion of any later United States use. It was also claimed that when the foreign use is nighttime, as it often will be, this means additional interference to U.S. stations even though it is not cognizable under the international R.S.S. rules just as it would not be domestically. This argument was one urged for repeal of the "25 percent unserved area" criterion for new nighttime assignments adopted in 1964.

29. *Use of preclusion studies.* One of the matters mentioned in the notice—not as part of the present proposal but for possible ultimate use—was a requirement of a "preclusion study", from which it could be determined what the impact from a given application proposal would be on other possible uses of the channel and adjacent channels in the general area, and what other assignment possibilities remain to meet the needs in the "preclusion area". Such a study is now required in connection with many petitions for FM rule making.

30. Some parties, e.g., Silliman, Moffat, and Kowalski, supported this as a useful and feasible concept; as mentioned above, some parties suggested it as a method of "case by case" evaluation, for example showing whether or not a proposed use would preclude an assignment which would serve "unserved area". On the other hand, at least one party (Booth) opposed it as unworkable, in view of the tremendous differences which exist in AM propagation (ground conductivity and frequency) and the many variables involved in possible directional operation.

31. *The "demand" system.* Many commenting parties praised the traditional "demand" system of AM assignments, as the basis of the country's unparalleled AM system (with its tremendous number of stations and local outlets), and urged that it be continued, although perhaps with some modifications to encourage service to "unserved areas". On the other hand, others (e.g., McKenna and Wilkinson) urged that this system be considerably modified or abandoned, for example with a table of assignments

[20] It was pointed out that rather recently (1968) the Commission found the city of Elizabeth, N.J., to be sufficiently needful of local service, despite the plethora of New York City signals, to warrant a local outlet as compared to a more distant community.

[21] Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945); FCC v. National Broadcasting Company (KOA), 319 U.S. 239 (1943). The former established the right of co-pending mutually exclusive applicants to a full hearing against each other; the latter established the right of a station, which would receive objectionable interference, to a hearing on that issue.

containing initially existing stations, with additions thereto as a result of rule making, just as in the FM and TV service.

32. *The concept of "waste".* It was said by some parties that the whole idea that AM spectrum is "wasted" by grants on a "demand" basis is basically wrong, for one reason because spectrum, while very much a valuable and scarce national asset, is not a "wasting" one in the sense that minerals or petroleum are. It was asserted that later shifts in station location or facilities—either voluntarily or through Commission "show cause" proceedings—are always possible. Therefore, it was said, the "waste" involved is in not permitting use of the frequencies now.

33. *Comments urging the importance of nighttime AM service.* A number of parties, many of them licensees of daytime-only stations, urged the importance of their being able to obtain nighttime facilities to better serve their communities and surrounding areas.[2] Three comments illustrate some aspects of these suggestions and possible approaches. Sea Broadcasting Corp. is the licensee of Station WVAB, the only station licensed to Virginia Beach, Va., a city which is one of the four large cities making up the Norfolk-Portsmouth Standard Metropolitan Statistical Area (SMSA), and had a 1970 census population of 172,106. WVAB is daytime-only, and the licensee urged that there is a great need for a local nighttime facility to meet the substantial particular needs of Virginia Beach, including matters such as elections, weather, and school closings, local emergencies, discussion of public issues, and provision of time for local advertisers and political candidates. It was asserted that the only full-time station generally received throughout this city, WTAR, Norfolk, simply does not meet these needs because it has 16 major communities to serve and, for example, mentioned Virginia Beach material only four times in a week of evening news programs (three of them on one evening about the same item). It was claimed that, while Virginia Beach is part of an SMSA with a larger city, the Commission should adhere to the policy applied in Monroeville Broadcasting Co., 12 FCC 2d 359 (1968), where it recognized the need of Monroeville, Pa., for an outlet despite a plethora of primary service from nearby Pittsburgh stations, finding that none of the latter showed "an above average sensitivity to the needs" of the city of Monroeville. FM was claimed not to be the answer, at least as to present needs, in view of the still much greater circulation and universality of AM. The suggestion was that the Commission adopt a rule to the effect that when a "major political unit" of over 50,000 lacks a local AM nighttime service, the "25 percent unserved area" and other technical rules should not apply if it is shown that the proposed facility would not cause interference to other stations (under the traditional nighttime standards) and that the proposed station would serve nighttime a substantial part of the population within the political unit.[3]

34. Another aspect of such situations is presented in the comments filed by Gordon A. Rogers, president of Radio KGAR, the licensee of daytime-only Station KGAR at Vancouver, Wash. Vancouver, a city of about 43,000 in southwestern Washington, in the Portland, Oreg., SMSA, has two other AM stations assigned, one full time (KISN), but, as Mr. Rogers pointed out, this station is actually located in Oregon (both studio and transmitter location) and has been the subject of Commission action because of improper identification as a Portland station (continuation of its operation is now the subject of a hearing proceeding, although not chiefly for this reason). Mr. Rogers claimed that this station really is designed to serve Portland and Oregon, and, in fact, does not serve Vancouver at all as a local outlet; and, that city and its county therefore do not have local nighttime service (no FM channel is assigned to Vancouver, nor, in view of its proximity to Portland, is such an assignment likely). Mr. Rogers vigorously opposed the notice proposal, as stifling AM development, instead urging that daytimers should be permitted to "go nighttime" if they can meet the traditional noninterference tests. It was pointed out that with Station KOIN-FM, Portland, having a very large 1 mv./m. coverage area, if FM service is taken into account as a bar to AM improvement, this would preclude AM facilities in an extremely large area in Oregon and Washington. If this is going to be the case, it was urged that KOIN should be required to give its AM facility to KGAR and take the present KGAR frequency, which has less coverage potential but would still leave KOIN with its wide-coverage FM and television facilities. It was urged that no "unserved area" test is appropriate in such cases.

35. The comments of Tri-State Broadcasting Co., licensee of daytime Station WGTA, Summerville, Ga., present another type of situation. Summerville is the county seat of Chattooga County, with populations of about 5,000 and 20,000 respectively, and WGTA is the only station in the county. No FM channel is assigned in the city or county, nor, in all probability, could an assignment be made. The only nighttime AM service in the area is from Class I Station WSB, Atlanta, which puts a 0.5 mv./m. signal, but not a 2 mv./v. signal into Summerville and thus provides primary service to the surrounding area but not to the city itself. Two Chattanooga FM stations provide predicted 1 mv./m. signals to the city and area; but it is claimed that these do not in fact provide adequate service because of rough terrain (they are respectively 32 and 44 miles distant. There is no local daily newspaper. Tri-State urged the great need of this area for local nighttime service (particularly in view of the large "three shift" work force which travels to and from work during nighttime hours), and, also, and in particular, the economic impossibility of building a directional array which would enable it to meet interference protection requirements at night with the normally permissable power level of 500 watts (regional channels). It was asserted that this (including the acquisition of a large enough site) would cost over $115,000, which is simply not justifiable in a community of this size. Therefore, Tri-State's basic request is for a rule which would permit it to operate nondirectionally with less than the minimum power, or 100.5 watts, which it could use and not raise the interference limit of co-channel stations. So operating, with a 9.73 mv./m. limit to it (a radius of about 4 miles), it would provide a primary service to some 8,221 persons, of whom 4,706 now receive no nighttime AM primary service and 3,472 receive only one, and would thus meet the "25 percent unserved area" test as modified in 1968 to include a 25 percent population criterion. It asked for a rule which would permit non-directional operation with sub-minimum power at night if the applicant shows that a directional array necessary to meet protection requirements with the regular minimum power would be either impossibly complex or economically unfeasible. It was urged that this approach would solve the problem of providing local nighttime service in many U.S. communities.

36. The "minority group" problem: Comments of Dr. Wendell Cox. The comments of Dr. Wendell Cox, D.D.S., a principal in, and general manager of black-owned full-time AM Station WCHB, Inkster, Mich., and FM Station WCHD, Detroit, related to the possible acquisition of broadcasting facilities by "minority groups"—blacks in his case—pointing out that while there are some 700 stations presenting at least some programming aimed at the black audience, there are very few black-owned stations (they include the stations mentioned, and assertedly only about seven other AM and fewer other FM stations; but the number has increased somewhat since these comments were filed in November 1969). Dr. Cox urged that rules not be adopted which would restrict the opportunity for ethnic and racial minorities to compete for additional facilities in markets where they constitute large portions of the population. He asserted that—with the disadvantaged position of the black population during the period when facilities in large markets were available, and the

[2] At least one station whose licensee made this argument, WPVL, Painesville, Ohio, has since applied for and received grant of nighttime facilities.

[3] The latter part of the proposal apparently represents the fact that a nighttime facility would not include all of Virginia Beach—which has a very large area—within its interference-free contour. Sea proposed that the Commission make this "substantial" determination on a case-by-case basis.

present impossibility of adding any new ones in most large cities—steps should be taken to make more frequencies available to such groups, rather than adopting further restrictions of the type contemplated by the notice. It was asserted that, while "militant" groups have approached this problem by renewal challenges, it should not be necessary to take something away from an existing licensee in order to achieve a minority voice, if there are other ways by which such groups can obtain new facilities. A re-shuffle of frequencies in places such as New York, it was claimed, could provide an additional channel which minority groups could seek.[24] Dr. Cox claimed that FM is not a substitute in this respect; Black taxi drivers, filling station workers, etc., are "transitor oriented" and FM sets are less available to poor black homes. Therefore, as shown by his experience with the Detroit FM station, the potential black FM audience at this time is small, even if FM channels were available in large cities, which they usually are not (and existing FM licensees, it was asserted, put prices on their existing FM stations which make purchase out of the question even for a fairly successful black group). Specifically, Dr. Cox opposed the notice proposal, urged that the Commission take steps (by re-shuffling channels) to provide at least one frequency in major markets where there is now not a black-owned or controlled station, and stated that he is not asking that channels be available only for black applicants, but that they be given an opportunity to compete for them.

37. *Suggestions advanced by the parties.* Besides general opposition to the restrictive aspects of the notice proposal, a number of parties advanced affirmative suggestions which they claim will improve aural broadcast service and the assignment process. Some of these—including the general elimination of the "25 percent unserved area" requirement for new nighttime facilities, possible use of "preclusions studies" as a basic allocation tool, the specific suggestions of the Virginia Beach and Summerville, Ga., applicants for getting nighttime facilities in their particular situations, and the suggestons of Dr. Cox concerning a voice for minority groups—have been mentioned. Others are discussed in the next few paragraphs. Some of these ideas are clearly beyond the scope of this proceeding; others could conceivably be adopted herein but in our view should be the subject of more exploration if they are to be considered at all; and still others, such as those relating to processing and procedures, do not require rule making.

38. *"Across the board" power increase.* The engineering firm of Cohen and Dippel—supported by a number of parties, particularly Class IV licensees seeking increased nighttime power—proposed an "across the board" power increase for all classes of stations. The proposal was that: (1) Class I stations could increase from 50 to 250 kw, with I–A stations directionalizing (on the "broken down" I–A channels) to protect II–A stations; and I–B stations similarly protecting co-channel I–B stanels to protect the new 1 mv./m. 50 percent contour of co-channel I–B stations (which is farther out than the present 0.5 mv./m. 50 percent contour), and Class II–A stations protecting Class I–A stations on the present 0.5 mv./m. 50 percent basis; (3) regional (Class III) stations to be permitted 25 kw (the Munn Engineering comments suggested consideration of an increase to 50 kw); and (4) Class IV stations to go to 500 watts at night with a 5/8 (0.625) wave length antenna. The latter is designed to reduce high-angle radiation, the chief source of interference to other stations within 300 miles. Studies on Class IV situations in Illinois and Tennessee, said to be typical, showed increases in interference limits of 35 percent and 12 percent, respectively, but increases in groundwave field intensity of 116 percent and 100 percent, resulting in a considerable net gain in service areas. In connection with the Class I power increase also, it was asserted that this would result in over-all improvement, improving both groundwave and skywave coverage despite increased interference. It was recognized that these changes might involve some adjacent problems in some cases, and also would often require modification of international agreements. ABS, in reply comments, urged that such changes would be very complex and should not be undertaken at the present stage of this proceeding.

39. *Treatment of I–A and adjacent channels.* A number of engineering, and other parties, suggested that the Commission take steps to make additional assignments (daytime if not full-time) on I–A channels, and wholly, or partly, lift the "freeze" on use of adjacent channels presently contained in § 1.569. On the other hand, CCBS, urging the importance of skywave service from unduplicated I–A stations, asked that steps be taken to "clear" a number of additional channels for wide-coverage operation, by moving to the FM band stations designed primarily for local coverage.

40. *Use of a table of AM assignments.* Some parties, such as McKenna and Wilkinson and Ralph Bitzer, supported the idea af a Table of Assignments for AM, which would contain initially only existing stations, with additional assignments requiring amendment of the Table through rule making.

41. *Suggestions concerning procedures and processing.* Other suggestions related to the Commission's procedures and methods used in handling and consideration of applications, in an effort to deal with the problems mentioned in the notice without the Draconian measure of a near-total "freeze". These included:

(a) *Relying on licensees to check for interference.* The AFCCE specifically, and other parties more generally, suggested that the Commission abandon the system whereby every AM application is carefully checked as to interference to existing stations, and instead, rely on the existing stations themselves for this, with the Commission staff initially only spot-checking and examining applications only where international considerations are involved. The AFCCE's suggestion was that a system (using only clerical personnel and a computer) be worked out for notifying existing stations on a monthly basis of all applications for facilities on their channels or up to 30 KHz removed, with the licensee to have the burden of objecting if interference to it would be involved. The licensee would have 60 days to file objections, with a complete engineering showing, and if objection is filed, the applicant and other parties would have 45 days to reply. The staff and the Commission would then consider the matter. If no objection is received and the application appears otherwise in order, it would automatically be granted.

(b) *Filings only by professional engineers.* The AFCCE and other engineering parties urged that applications be required to be prepared by professional engineers, as a way of insuring engineering showings of good quality, accuracy, and completeness. It was said that this requirement—under which persons of "proven ethics and expertise" would be putting their reputations "on the line"—would go far to cut down the staff and Commission problems in dealing with inferior engineering submissions. In this respect, these parties make the same arguments urged by the AFCCE in a pending petition to adopt this requirement for all of the Commission's processes which involve engineering.

(c) *Furnishing an extract of material in the application.* McKenna and Wilkinson, noting that one of the time-consuming aspects of application processing is the preparation of memoranda setting forth the important facts as to an application—not only engineering but finances, ownership, programming, etc.—suggested that applicants be required to file with their applications an extract of key information in these categories, which would shorten the time involved in presenting items for consideration at higher staff level or by the Commission.

(d) *Increased filing fees.* Silliman, Moffat, and Kowalski suggested that application filing fees might well be raised, to cover the substantial costs of AM application processing if it is to be continued on its traditional basis (as the parties generally believed it should). In 1970, of course, the Commission raised its fees, for AM and other applications, substantially compared to what they were when these comments were filed, and further increases are currently under consideration.

(e) *Use of computers.* A number of parties suggested that the Commission should make more use of computers in AM processing. The Silliman comments suggested the accumulation of information concerning AM stations in a "computer bank," which would be available

[24] These comments were accompanied by an engineering statement of E. Harold Munn, Jr., to the same effect as part of his separate engineering comments, including data as to channel spacing and the date of authorization of stations in large cities.

to the public and also supported, at least in part, by public users.

42. *Suggested broadening of the proceeding.* Some parties, notably E. Harold Munn, Jr., urged that the scope of the proceeding should be broadened by a notice of inquiry and further notice of proposed rule making. Munn suggested that such a document might well look toward the following, in addition to further breakdown of the I–A channels already discussed:

(a) "Show cause" orders to daytime-only licensees as to why they should not be required to install nighttime facilities, in cases where it appears that they feasibly could and particularly where FM channels are not available;

(b) Steps to meet the needs of minority groups for increased ownership of facilities.

(c) Moving I–A stations out of the large cities, where they are now located, to smaller places where they could do a much better job of serving "unserved area," replacing them in the large centers by Class II or III stations.

(d) "Show Cause" orders to full-time stations which cause high nighttime limits to stations in "unserved area" portions of the country, as to why they should not be required to improve their arrays so as to reduce interference to these stations.

(e) Setting a time limit for resolution of the Clear Channel proceeding.

43. *Other suggestions.* Other suggestions made included the formation of a joint Government-industry committee to undertake a sweeping evaluation and reform of the aural broadcasting assignment structure; that the Commission urge adoption of "all channel" AM–FM receiver legislation as really the only effective way of bringing these two aural services to parity; and various fundamental changes in AM and FM technical rules (suggested in the Booth Comments).[25]

We have not mentioned specifically herein the longest comments of all, those filed by Coastal Broadcasting Co., Inc., licensee of WBEA and WBEA–FM, Ellsworth, Maine. These largely were related to that party's pending petition for breakdown of the Class I–A channel 820 kHz to provide a new Class II–A assignment in Maine. They made the same point urged by others herein as to the inadequacy of FM as a substitute for additional FM developemnt in places such as northern Maine, and of the alleged difficulty in getting coverage via FM comparable to that which a II–A station could provide.

IV. The Distribution of AM and FM Service and Facilities in the Conterminous 48 States

44. For reasons discussed below, rather than the "rules pending further study" contemplated by the Notice herein, we have decided to adopt instead, rules which are expected, with minor modifications, to govern the assignment of new and increased AM facilities for some time to come. Therefore, it is appropriate to examine the picture of aural broadcast service as it is today in the United States, both with respect to reception or the availability of a usable signal from a nearby or distant source, and as to transmission, the existence or absence of a local station, or full-time service or a choice of local service, in communities, or nearby communities. It is of course well settled that under section 307(b) of the Communications Act, the Commission's mandate to provide for a "fair, efficient, and equitable distribution of radio service" includes both of these concepts, as do the various statements of Commission allocation principles such as the Sixth Report and Order (1952) in television, and the notice of proposed rule making in Docket No. 15084 (1963), the proceeding which led to the 1964 AM rules. The discussion below relates to the 48 conterminous States; we discuss later herein the situation in Alaska, Hawaii, Puerto Rico, and the Virgin Islands, which present different considerations because of their distance from the rest of the Nation.

A. AM and FM Reception and Service

45. *Daytime AM service.* With more than 4,200 stations in the 48 States, all operating daytime, daytime AM service in the Nation is extremely widespread, and—except in the West and certain limited areas elsewhere—all but very small areas have at least one daytime primary service.[26] Daytime "gray" areas, which receive only one primary service, appear to be somewhat larger (especially in view of the extent, discussed below, to which many counties in the United States have only one station); but even here there is relatively little absence of a choice of service. As indicated in paragraph 22, above, the 1962 NAB-George Davis study showed that in the Southeast, by 1960, only 0.6 percent of that region's area had no primary service, and only 1.4 percent of the area was limited to one primary service.

46. *Nighttime primary service.* "Unserved areas", those without primary service, are substantially larger at night because of the high interference levels which prevail (limiting the service areas of those stations which operate at night). The tool usually used in evaluating this situation is a map originally prepared by CCBS in the 1940's for the Clear Channel proceeding and updated in January 1962 to reflect 1961 conditions (it is generally agreed that in overall terms, nighttime "unserved area" has not been significantly changed since). This shows some 1,726,000 square miles, or over half of the land area of the conterminous 48 States, as without nighttime "Type B" groundwave service.[27] This area in 1961 contained some 25,106,000 people.[28] The amount of "gray" area, receiving only one primary service at night, is also substantial. The unserved area includes a considerable portion of the three Pacific Coast States, the bulk of the Mountain and western portion of the Plains States, and the bulk of the south and southeast, Virginia and West Virginia, and northern New England as well as substantial portions of Michigan and Pennsylvania and parts of most other States. An important factor in the provision of service, in overall area terms, is the wide primary services areas of the Class I clear channel stations, such as those at New York, Chicago, St. Louis, Cincinnati, Des Moines, Minneapolis, New Orleans, Fort Worth, and elsewhere.[29] One factor reinforcing this pattern, as elaborated below, is that the bulk Class II and III fulltime stations are also located in or near the large cities of the country (Class IV stations also operate full time and are much more widely distributed geographically, but they have very small nighttime coverage areas principally because of the very high interferece levels which result from the great many co-channel stations).

47. *Skywave (secondary) service from Class I stations.* In order to offset these limitations on nighttime primary service, reliance is placed on the skywave, or secondary, service rendered at night by Class I stations (25 I–A and 33 I–B) assigned to operate with high power and afforded a high degree of protection so that they can provide this service. Skywave service is recognized as somewhat intermittent and subject to "fading"; but it is a useful way of providing at least a modicum of service to the large "unserved areas." This service is regarded as generally useful out to about the station's 0.5 mv./m. 50-percent-skywave

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[25] These included, in FM, reducing both the bandwidth (to 100 kHz) and the adjacent-channel requirements, and, in AM, deleting the allegedly obsolete "blanketing" and second and third adjacent channel separation requirements, and liberalizing the rules concerning principal-city coverage; and exploration of "single sideband" AM operation.

[26] There are extensive "unserved areas" in the Plains and Mountain States (and the interior portions of some of the Pacific States), and smaller areas farther east, including northern New England, northern New York, upper Michigan and northern Minnesota, and possibly north central Pennsylvania. In the east and southeast there are small interstitial unserved areas, particularly where ground conductivity is low.

[27] The "Type B" groundwave nighttime service shown on the CCBS map is roughly equivalent to primary service, representing more sophisticated concepts evolved during the clear channel proceeding, whose validity the Commission recognized but whose complexity was held to make it unsuitable for ordinary application processing.

[28] The "unserved area" actually increased slightly from 1957 to 1961, but the population declined slightly. In the portion of the presunrise proceedings concerning the I–A channels (Dockets 17562 et al.), some of the Class II opponents of the I–A stations urged that the decline in population, despite an increase in area and the great population growth of the United States generally, meant that this largely rural "unserved area" was losing population so that providing it with nighttime service is a matter of smaller importance. See the report and order in Dockets 17562 et al., 18 FCC 2d 705, 715 (1969).

[29] One of the oft-mentioned aspects of this situation is that the bulk of the nighttime "unserved area" is in the west; but the bulk of the "unserved population" is in the east and southeast.

contour, which for a nondirectional operation is 700 to 750 miles from its transmitter. All parts of the United States receive skywave service from these Class I stations, usually from several.

48. *FM service.* FM service, from more than 2,200 stations, is likewise widespread in most of the Nation, generally excepting the areas mentioned above for daytime AM service. The FM coverage map published periodically by the NAB shows the United States as completely covered, except for very small areas, about as far west as the 98th meridian in the Plains States, and then largely a coverage void until the Pacific States are reached. However, this is based on coverage out to a station's 50 uv./m. contour, which does not always represent reliable service and is not the basis of interference protection.[*] As mentioned in paragraph 18, above, the NAB introduced a map herein showing almost complete coverage of the State of North Carolina by 1 mv./m. signals from existing North Carolina facilities. However, since North Carolina is and has long been a State of widespread FM development, this is not necessarily typical of all of the Nation. The engineering comments prepared by Peter V. Gureckis contained a similar map of all of the United States east of the Mississippi (1-mv./m. coverage of all existing stations and assuming use of unoccupied channels); it shows only a small number of "unserved areas", of which the only ones of real size are northern Maine, northern New York, upper Michigan, central West Virginia and western Virginia, and southwestern Florida. Nighttime FM is in general considerably more widespread than AM primary service. Limited FM set circulation still remains a problem, although this is improving except possibly in the important auto radio market (see the notice herein, paragraph 5).

DISCUSSION AND DECISION

49. In deciding upon the nature of the rules to be adopted in this proceeding pursuant to our proposals herein, and in the light of the comments filed, we have explored in depth approaches which would be "fine-grained"—would take into detailed account the actual distribution of aural broadcast service over the country, and result in rules aimed at remedying service deficiencies, if not on a case-to-case basis, in a manner approximating it. However it soon appeared that the body of rules necessary to mount this kind of attack on the problem would be formidably complicated, and their implementation would impose a heavy administrative burden on the Commission and on licensees and applicants—all without any firm assurance that the result, as evidenced by a more equitable and efficient distribution of broadcast facilities, would be sufficiently significant to justify the attendant effort and expense.

50. Therefore, we have abandoned this approach, and are adopting comparatively simple rules in an attempt to accomplish our objective—to control the expansion of standard broadcast service in such a manner that, in the future, grants of new standard broadcast stations or changes in existing stations will be limited largely to those situations in which improvements in the existing level of aural service are clearly needed, and cannot readily be achieved by alternative means. In following this course of action, we are rejecting the suggestions of those parties who urge that we revert to an unrestricted "demand" system—that we accept and process any standard broadcast application which meets the basic technical standards, and abandon rules tailored to limit the addition of new stations to communities which we deem to have sufficient aural service. These parties tend to argue that the tremendous number of AM stations which have been assigned under this system is a demonstration of the excellence of the system, and that "demand" can be considered as a true indicator of the public need for additional broadcast service. We do not believe that effectiveness of a system of broadcast allocations can be measured solely or even primarily by the fact that it provides an open-ended avenue for the apparently unlimited expansion in the number of stations. As we have often observed, the unrestricted operation of such a system almost inevitably results in an inequitable distribution of facilities, with an undue concentration of stations in the larger communities. Nor do we believe that "demand," as evidenced by the willingness of entrepreneurs to hazard funds for the establishment or purchase of stations is a true reflector of the public need for additional broadcast service. Typically, any of the largest cities have a multitude of aural services, and it is difficult to conceive a substantial public requirement for any greater number, yet the "demand" remains, as demonstrated by the prices commanded by standard broadcast stations which change hands in those cities. Accordingly, we find no justification for jettisoning rules designed to direct the future growth of the standard broadcast service into areas where there is inadequate existing service by any reasonable standard.

51. The major rule amendments which we are adopting are embodied in a new paragraph, which, together with pertinent notes, would be added to present § 73.37 of the rules. This paragraph sets forth requirements bearing on the acceptability of applications in addition to the no overlap and noninterference showings presently required by the rule. A discussion of the positions advanced by the parties to this proceeding, and our reasons for adopting these particular rules, can be conducted most fruitfully if we here set forth the new paragraph, and examine its provisions and their implications in the light of the considerations involved.

52. Section 73.37(e) in addition to a demonstration of compliance with the requirements of paragraph (a), and, where appropriate, paragraphs (b), (c), and (d) of this section, an application for a new standard broadcast station, or for a major change (see § 1.571(a)(1)) in an authorized standard broadcast station, as a condition for its acceptance shall make satisfactory showings as indicated below for the kind of application submitted.

(1) Application for a new daytime station, or for a change in the frequency of an existing daytime station.

(i) That at least 25 percent of the area or population which would receive interference-free primary service from the proposed station does not receive such service from an authorized standard broadcast station or receive service from an authorized FM broadcast station with a signal strength of 1 mv./m., or greater, or

(ii) That no FM channel is available for use in the community designated in the application and that at least 20 percent of the area or population of the community receives less than two daytime aural services. For the purpose of this showing an aural service shall be deemed to be provided by an interference-free groundwave signal from an authorized standard broadcast station of a strength of 5 mv./m., or greater, or by an F (50,50) signal from an authorized FM broadcast station of a strength of 70 dbu (3.16 mv./m.), or greater.

(2) Application for a new unlimited time station, for a change in the frequency of an authorized unlimited time station, or for nighttime facilities by an authorized daytime station, a satisfactory showing under (i) (except for a Class IV station), and under either (ii) or (iii):

(i) That objectionable interference at night will not result to any authorized station, as determined pursuant to § 73.182(o).

(ii) That at least 25 percent of the area or population which would receive interference-free primary service at night from the proposed station does not receive such service from an authorized standard broadcast station, or service from an authorized FM broadcast station with a signal strength of 1 mv./m., or greater, or

(iii) That no FM channel is available for use in the community designated in the application, and at least 20 percent of the area or population of the community receives less than two nighttime aural services. For the purpose of this showing, an aural service shall be deemed to be provided by an interference-free groundwave signal from an authorized standard broadcast station with a strength of 5 mv./m., or greater, or by an F (50,50) signal from an authorized FM broadcast station with a strength of 70 dbu (3.16 mv./m.), or greater.

[*] Section 73.315(b) states that a signal as low as 50 uv./m. may provide service in rural areas. However, stations have never been protected against interference out to this contour; and in Commission proceedings the 1 mv./m. contour is usually the signal-intensity contour considered. Applicants are required to show the location o fthe 1 mv./m. and the 3.16 mv./m. (principal-city signal) contours.

(3) Application by an authorized station (other than a Class IV station) proposing changes in facilities, other than a change in frequency, must make a satisfactory showing, where appropriate, under (i), and under either (ii) or (iii).

(i) For a change in nighttime facilities, that the proposed change will not result in objectionable interference to other stations as determined pursuant to § 73.182(o).

(ii) For an increase in power, either daytime or nighttime, that the authorized operation, during the portion of the broadcast day for which power increase is sought, includes less than 80 percent of the area or population of the community to which the station is assigned within its 5 mv./m. groundwave contour (or within its interference-free groundwave contour, if of a higher value), or,

(iii) For an increase in power, that at least 25 percent of the area or population which, as a result of the power increase, for the first time would receive interference-free primary service from the station, is without primary service from any other standard broadcast station.

New notes appended to § 73.37 define the circumstances controlling the availability of an FM channel, and, with respect to the determination of existing services, stipulate that signals from stations located more than 50 miles from the community for which the station is proposed will not be considered, and that co-owned FM and standard broadcast stations shall be considered as providing a single aural service. A study of the provisions of this paragraph will reveal the following additional criteria which will henceforth govern the acceptance of applications for standard broadcast stations:

(1) A showing, for a new daytime station that 25 percent of the area or population within its proposed service area is without primary service from any existing standard broadcast station, or comparable service from an FM broadcast station, and, for a new unlimited time station, that this condition exists during nighttime hours.

(2) An alternative showing that the community for which the new station is proposed receives from existing stations a degree of service which, for the purposes of this document will be referred to as "inadequate"—that the community is not substantially covered by at least two independent (not commonly owned) aural (AM or FM) services with field strengths of a level normally required to be provided by a station assigned to that community—and that an FM channel is not available to the community which might be utilized to rectify the service inadequacy. In the determination of the adequacy of existing service to the community for which the application is designed, we have further provided that signals from distant stations—that is, from stations whose transmitters are located more than 50 miles from the community—are not to be considered.

(3) Subject to the overlap and interference restrictions of § 73.37 we will accept applications from existing stations for increased power within the limits permitted the class of station involved on a showing either that at least 25 percent of the newly served population or area would receive a first primary service, or that, with existing facilities, the station does not adequately cover its community—inadequate coverage being presumed if less than 80 percent of the population or area of the community receives an interference-free signal of 5 mv./m. or greater. For an unlimited time station, this test is applied separately nighttime and daytime, and an application for such a power increase based on inadequate community coverage is accepted only for the portion of the broadcast day during which inadequate coverage is shown.

53. The Commission has found in numerous cases that coverage of a community approximating 90 percent of its area or population with a signal of required strength is in substantial compliance with the service requirements of its rules. The 80-percent figure used herein as the minimum level for adequate coverage of its community by an existing station was chosen as a figure below which service can be deemed clearly inadequate, even in the light of existing Commission policy. For a similar reason, we have used the complement of this figure, 20 percent, as the criterion to be employed by the applicant for a new station in a demonstration of the area or population of a community unserved by existing stations.

54. It will be observed that, in the provision of aural service, we are treating FM as a full and viable partner of AM, in that we both accord existing FM service equal status with AM in the determination of whether a particular community is being "adequately" served, and, where service can be shown to be inadequate, that we point to FM as the favored means for correcting this deficiency.

55. We have given full consideration to the arguments filed in opposition to our proposal to accord a major role to FM in future endeavors to improve aural broadcast service, and have concluded that it is in the overall public interest that existing and potential FM service be relied on to the extent feasible. It is quite clear that, under the allocation practices prevailing heretofore, nighttime primary service from AM broadcast stations has not improved appreciably in areas where it is most needed, and, considering the nature of the problem, is unlikely to. FM is virtually the only means by which admittedly inadequate nighttime primary service may be improved substantially; in contrast to daytime stations, which have constituted the bulk of new standard broadcast stations authorized in the recent past, each new FM station provides a new and significant nighttime service. The argument has been advanced that the typical FM station does not provide service over an area as extensive as that usually served during daytime hours by a standard broadcast station. This is certainly true if the areas within the respective 1 mv./m. and 0.5 mv./m. protected service contours of such stations are compared. However, we believe that this advantage of AM, as demonstrated in this manner, becomes of far less significance when service comparisons are made under actual operating conditions. At locations where the extent of service provided by the FM or an AM station is effectively limited to its protected contour by interference from other stations, there is usually a plethora of service from such stations, and wide area coverage by either station, in all probability, contributes little to the revenues received by the station or service needed by the public. In less densely populated areas, where stations are fewer in number and more widely separated, the effective service areas of the FM and standard broadcast stations may approach comparability, since, as is widely recognized, in the absence of interference from other stations, an FM station will provide service roughly equivalent in quality to the 0.5 mv./m. service from a standard broadcast station, out to its 50 uv./m. contour.

56. Whether or not an FM station is less expensive to install than an AM station of comparable size (in our notice, we asserted that this was the case, but several of the comments asserted this was not necessarily so, and offered typical cost data in support of this contention), the differential one way or another, does not appear so great as to influence our action in this matter. While it has been urged that there is still an insufficient number of sets capable of receiving FM signals in the hands of the public to make the AM and FM services fully comparable, we find that this situation is one that is rather rapidly being alleviated. For instance, EIA[2] shows for the year 1971, approximately 59 percent of all radios, other than those for automobiles, produced or imported, had FM capability. Admittedly, automobile radios which include FM constituted only about 19 percent of such radios produced or imported in 1971, but this percentage has risen from a figure of around 11 percent for the year 1968. Those opposing the adoption of rules according coequal status to FM have emphasized that an extremely important section of the aural market is the commuting public, and the small proportion of cars equipped to receive FM programs present a serious threat to the economic viability of FM stations. However, it should be noted that the rules which we are adopting generally favor the growth of stations in the smaller, and more isolated markets when existing aural service can be demonstrated to be less than adequate. In such markets extensive commuting to and from work may be expected to be relatively less important, both as to the number of persons involved and the average duration of the trip. It is urged

that, in such markets, FM has had little previous acceptance, and, accordingly, the percentage of FM receivers in the hands of the general public is considerably lower than the national average. This seems essentially a "chicken and egg" proposition. Until FM service is available to these communities it is probably futile to expect that listeners will undertake to provide themselves with equipment for the reception of FM programs. The most potent impetus to the growth of the number of such receivers, is the existence of satisfactory service from FM stations. We do not believe, with the general availability of suitable receivers at reasonable prices, the fact that, in a particular instance, the radio audience has had no incentive to purchase such receivers is reason to refrain from supplying that incentive. At the present time, in excess of 2,300 FM stations are on the air, more than half the number of AM stations. This FM total, furthermore, does not include in excess of 500 non-commercial educational stations. Taking all of these factors into consideration, we are convinced that FM is ready and able to assume its full share of the burden for improving aural service to the American public. Our rules recognize this fact and assign to FM the role which it merits.

57. However, the amended rules provide that the determination of the adequacy of aural service to a community from existing stations be made without the inclusion of service which may be provided by noncommercial educational standard broadcast and FM stations. Our decision on this point has been arrived at with full recognition of the importance of the service rendered by such stations. Nevertheless, we have endeavored to tailor our rules so as to make possible the provision to each community of two "competing voices." These "competing voices" will be sources, not only of two program services, but, hopefully, will present two independent viewpoints on matters of community concern. Over 60 percent of the FM educational stations in the United States are Class D 10-watt stations operated by educational institutions, both at the college and secondary school levels. These stations are operated primarily for the benefit of the student body, their effective service area is very limited, and they very often are off the air during school vacation periods. Further, many of this class of stations serve primarily as training facilities to teach students the art and science of broadcasting. For these reasons, these stations are not truly voices in the community and should not be counted as such. Although other classes of educational FM stations may actually provide adequate signals to the communities to which they are licensed, they, like the Class D station, are exempted from many of the operating requirements imposed upon commercial stations. For example, educational stations have no minimum hours of operation; they are not required to provide their community of license with a minimum required field intensity; and they are not presently required to ascertain community needs and interests and provide programing to meet such ascertained needs and interests. With respect to noncommercial educational AM stations, their numbers are so small—less than 30 out of more than 4,000 AM stations—that as a practical matter, we believe that they should also be excluded from consideration. Accordingly, for the purposes herein, we will exclude such station from consideration in an assessment of existing aural service to the community. We do this with no intention of diminishing the value of educational broadcast service, which, where it exists, provides a desirable and unique bonus in available programing.

58. The rules provide that where a prospective applicant intends to rely on a demonstration that service to a community is inadequate, he must also show that no channel is available for a new FM station serving the community. A channel assigned to the community is considered unavailable if occupied by an authorized station, whether or not the station is in actual operation. If the channel is unoccupied, but applied for in that community, it is still "available," since, whatever applicant finally gains an authorization on the channel, the station will supply service to the community. A channel is also available if it is unoccupied, and can be used in the community pursuant to § 73.203(b) of the FM rules (the 10-15-mile rule).

59. The FM Table is not "saturated" in the less populated areas, and we had considered the advisability, where no FM channel had been assigned to a community, or requiring, as a necessary condition for the acceptance of an application for an AM station in that community, a showing that it was not technically feasible to make such an assignment. However, we have decided that the complications involved in such a negative showing are not warranted, and we, accordingly, have determined upon the simpler formulation.

60. Also, it may be noted, we have not specified a preclusion showing in the acceptability criteria—that a station assigned to the proposed community will not preclude a more needed or more efficient assignment elsewhere. This kind of showing had been considered as particularly appropriate with respect to daytime stations, whose proliferation might limit opportunities for new unlimited time assignments, with their greater service potentiality. When we invited comments concerning the possible adoption of rules requiring such showings, we indicated we had rather strong reservations about their practicability, when considered with respect to AM allocations. While one or two of the parties who discussed this matter believed that preclusion studies might usefully be required, at least on a case-to-case basis, others opposed their employment under any circumstances. Upon further consideration of all facets of this matter, not only the many variables which affect AM signal propagation, but the kinds of decisions, both economic and engineering, which must be made concerning the use of directional antennas, decisions particularly within the purview of each applicant proposing such an antenna, we have concluded that such studies, while inevitably being complicated and costly, would still be unlikely, in most instances, to provide definitive "yes" or "no" answers to the preclusion question. Rather, the requirement for such showings would introduce a new element of uncertainty and complication in our application processing procedures which we can well do without.

61. As we proposed in our notice in this proceeding we are requiring a showing of service to twenty-five percent unserved area or population as an application acceptability criterion for daytime proposals, and are retaining this requirement where nighttime operation is contemplated. This requirement represents an effort to channel new AM assignments to locations where each contributes materially toward the achievement of the first of the traditional service priorities—the provision of service to all of the U.S. population. While this remains a desirable aim, long experience has demonstrated that it cannot be fully achieved under a system of broadcasting where each station must be financially self-sustaining, and accordingly, must be located where population is sufficiently concentrated to provide the necessary support. Accordingly, we have offered an alternative test, applicable to both daytime and nighttime operation, which reflects our aim toward attainment of two other important priorities, the provision of first and a second locally oriented service to each community.

62. For present purposes, these priorities are observed in modified form, in that:

(1) The contributions of two aural services, AM and FM, are considered together in the satisfaction of these priorities.

(2) Existing aural services to a community, if they are of adequate strength and are provided by stations not too distant from the community, are considered to satisfy these priorities. Traditionally, the priorities have been applied with respect to stations which are assigned to the community.

63. We have already discussed our reasons for treating AM and FM as a single service in this context. Insofar as the second point is concerned, we have remarked that while the assignment of first and second stations to each community traditionally has been an important allocations objective, that many communities are very small, and the full achievement of this objective in the limited spectrum space available is not feasible. In recent years, we have placed considerable emphasis on the obligation of each station to tailor its programs to serve the needs of all substantial population segments in its service area. Thus, if a community is served with a 5 mv./m.

[11] Consumer Electronics—1972—Annual Review—published by Consumer Electronics Group of the Electronic Industries Association.

signal from a nearby AM station (or 3.16 mv./m. signal from an FM station) it obviously receives a technically adequate service from that station, and, we believe, could expect that station to give adequate attention, in its programs, to the purely local concerns of the community.

64. In the determination of existing service to each community, however, we have provided that service from stations whose transmitter sites are more than 50 miles from the community be excluded, on the assumption that stations at such distances from the community could not reasonably be expected to devote a substantial part of their broadcasting time to the particular needs of the community. The choice of this distance, of course, has been, to some extent, arbitrary, but we believe it is a good compromise. As the distance of a station from a particular community increases, the likelihood that the station, as a practical matter, can give a substantial degree of attention to the specific needs of the community rapidly lessens. For instance, a station delivering a 5 mv./m. signal at a distance of 10 miles has a service area which is roughly 1/25 of the service area of a station delivering a signal of comparable strength at 50 miles. The latter station obviously will have a very much greater number of separate communities within its service area, and would be much less able to concentrate on the needs of specific communities in that area, than would a station with more restricted service contours.

65. We were also concerned, in our aim to provide each community with two adequate aural services, that these services be "competing voices". Thus, for the purpose of the existing service determination, we have treated service rendered by commonly owned FM and AM stations as a single service. This is the only kind of common ownership situation which will be encountered in this connection, since in meeting the requirements of §§ 73.35 and 73.240 of our rules, commonly owned AM stations or commonly owned FM stations would be so separated geographically that under no circumstances would the 5 mv./m. contours (of AM stations) or the 70 dbu contours (of FM stations) encompass the same areas.

66. While we are adopting rules with respect to new daytime stations which are substantially more restrictive than the present rules, the rules for nighttime AM service, even though making the presence of availability of FM service as a new consideration, have been somewhat liberalized, since we have provided alternative tests for application acceptability which are the same as we have prescribed for daytime applications—rather than continuing to rely solely on a showing of proposed service to unserved area or population. In situations where FM is not available to a particular community, we are ready to accept an application contemplating a nighttime operation when it is shown that the proposed station is necessary to insure that the community receives two adequate aural services at night, and it offers protection for other stations which our rules require. We believe a new nighttime assignment may be justified under such circumstances as an exception to a policy aimed at avoiding an undue proliferation of such assignments.

67. Some of those commenting hold that we are unduly concerned with the effect an existing service of adding new stations for operation after nightfall, and dispute our claim that each new assignment, regardless of the degree of protection offered pursuant to existing rules, imposes its modicum of interference, with some effective limitation to the service provided by existing stations. It is suggested that this, in fact, does not occur—that an older station continues to provide interference-free service to as large areas as in former years, but many of the listeners to this station are now in suburban areas, more remote from the station than previously. While they may find reception unsatisfactory, and ascribe this condition to a shrinkage in the interference-free service area of the station, in reality their poorer reception results from the fact that they reside at more distant locations. This opinion is offered without supporting evidence, which admittedly could be developed only by a great many observations of a number of stations over a long period of time. Our own observation, offered similarly without technical support, has led us to a distinctly contrary conclusion—we believe that regional stations, in particular, despite computations made under existing rules which may demonstrate that limitations remain unchanged, have suffered a progressive deterioration in the extent of the areas over which they can provide interference-free service. If this conclusion is correct, there are at least two causes to which the effect might be ascribed: (1) That our methods of predicting interference do not fully take into account the cumulative effect of interference from many sources, and (2) that the directional antennas used by most regional stations for restricting radiation toward other co-channel stations do not, in many cases, limit interference produced by skywave transmission to a degree which might be predicted from consideration of the antenna design. At least one study has been made tending to show that this can be the case—that directional antennas designed for a high degree of suppression of radiation at angles above the horizontal produce interfering skywave signals substantially exceeding those which would be predicted under the Commission's rules.[3] This last consideration is particularly important in considering the addition of new nighttime services to already overcrowded regional channels. Stations "shoehorned" in under such conditions almost invariably require the use of directional antennas designed to radiate very little energy in various directions above the horizontal plane, so as to provide the degree of nominal protection for other stations required by the Commission's rules. If this protection is not, in fact, achieved, as it well may not be, the result is a higher level of interference to these stations than was anticipated.

68. For these reasons, and because, in general, such new stations, subject to interference from many other stations, have very limited interference-free service areas and contribute little to overall nighttime service, we will continue to restrict new nighttime assignments to those cases where they can provide clearly needed new service and there is no available alternative means for providing this service.

69. Because we recognize the problems faced by many existing stations in continuing to serve satisfactorily communities which, over the years, have expanded to geographic extent, the amended rules are framed so as to permit stations able to demonstrate that their existing community coverage is inadequate to increase power within the limits specified by our rules, subject to compliance with overlap and interference considerations. However, permissible power increases are selective—an unlimited time station will be permitted to increase power only during the portion of the broadcast day when existing community coverage is shown to be inadequate (or it can be shown that 25 percent of the area or population newly served as a result of the power increase would receive its first primary service). Of course, power increases permitted on such a selective basis may result in cases where some unlimited time stations are authorized to operate with higher power at night than during the daytime. While this result may be at variance to the usual situation, in which the station's daytime power is equal to or greater than its nighttime power, there appears little justification for permitting a power increase during a portion of the broadcast day for which the applicant is unable to make a satisfactory showing, pursuant to the rules, of service benefits resulting from the increase.

70. We have not adopted any rule provisions, as suggested by some of the parties, directed specifically toward making easier the acquisition of nighttime facilities by daytime stations. Indirectly, we believe we have done this, however, by upgrading the requirements for adequate service to each community from existing stations. Thus, if the licensee of a daytime station can demonstrate that no unused FM channel is available to his community, and that other stations fail to provide at least two "adequate" nighttime aural services to that community, he is eligible, if his proposal will meet the

[3] Suppression Performance of Directional Antenna Systems in the Standard Broadcast Band—FCC Office of Chief Engineer—TRR Report 1.2.7. This report analyzes the results of skywave measurements on directional arrays made in April 1949, by NARBA Preparatory Committee IA.

nighttime protection requirements for other stations, to apply for full time operation. However, he would not be permitted to tailor the proposed nighttime power, as Tri-State requests, to whatever level might be necessary to provide protection, with non-directional operation, for other stations. An appealing case might be made for this kind of operation in an individual instance. However, the net effect of a rule relaxation permitting such operation would be a proliferation of many low cost, but substandard nighttime facilities, generally providing inadequate service to their communities, and contributing to a level of actual (as distinguished from computed) interference far outweighing the service benefits which they might provide.

71. As indicated in our earlier discussion of these matters, proposals for an across-the-band power increase, and involving changes in the rules governing the use of the clear channels are beyond the scope of this proceeding. Any broadening of its coverage to include such questions could result in an extension of the "freeze" on the acceptance of applications into the distant future, a result which we believe is undesired by any of the parties. We have given full consideration to those suggestions aimed at mitigating the Commission's workload in the processing applications for standard broadcast stations, and may eventually test the feasibility of certain of the ideas presented. At the present, since we are unable to forecast accurately the degree to which application filings pursuant to the amended rules will present a major problem, we intend to proceed in this area as described in paragraph 77 of this report and order.

72. A petition for special consideration of minority groups presents not a requirement for more stations serving the special interests of these groups (on the contrary, it is claimed that approximately 700 stations carry at least some programing directed especially to the black audience), but seeks an opportunity for new stations which are black owned. This need is seen as especially great in the larger markets, where the greatest concentrations of minority groups are found; it is also in these markets, however, where new facilities are less likely to be available, both because the plethora of existing stations diminishes the possibility of technically feasible new assignments, and because the Commission's policies are generally aimed toward precluding further additions to the many broadcast services already provided such cities. It is urged, however, that, it is only recently that the blacks' financial and social position has advanced to a degree that broadcast station ownership has become possible—meanwhile, the available assignments in these population centers have been utilized. It is further stated that the purchase of existing facilities in these markets by black groups is either not possible, or involves prices so monumentally high as to be prohibitive. Accordingly, the only practical avenue through which black ownership of broadcast facilities can be accomplished is through allocation policies which make additional assignments possible.

73. Conceding the truth of all of these allegations, and that the promotion of minority group ownership of broadcast facilities is a socially desirable end, we are unable to see how this objective may be furthered effectively in a proceeding, such as this, and within the framework of the statutory scheme which circumscribes our actions. Obviously, should we modify and relax all nontechnical rules which tend to restrict additional assignments, the opportunities in general for minority controlled applicants to seek new facilities may be increased, but at the expense of basic allocation objectives, and without any real assurance that these opportunities can or will be effectively exercised. In any event, the availability of new assignment opportunities in the larger cities, in which the largest minority groups reside, is not controlled by rules such as we now adopt, but by the basic technical standards. The petitioner demonstrates this in a study appended to his filing which shows in the "top 10" markets, nearly all of the existing standard broadcast stations were assigned in these markets prior to 1950, long before the Commission became actively concerned with the undue concentration of stations in the larger population centers, and adopted rules designed to direct the future growth of stations to areas where additional service is more greatly needed. Thus, absent a revision of the standards which now define the limits of service and interference, a revision which is clearly beyond the ambit of this proceeding, there is no action the Commission could appropriately take which would further the particular objectives of the petitioner.

74. The new showings as to the extent of existing AM and FM service, and the availability of FM channels will not be required in applications for new AM broadcast facilities in Alaska, which will continue to be governed by the more liberal policies which are presently set forth in paragraph (5) of Note 2 in § 1.571. These policies, which were adopted on an interim basis at the time of the freeze, will be made permanent. Accordingly, the substance of aforementioned paragraph (5) is being added as a new paragraph (f) to § 73.37. Moreover, we have decided to apply these policies with respect to applications submitted for new facilities in Puerto Rico, the Virgin Islands, Hawaii, Guam, and American Samoa as indicated in paragraph (f). While the aural broadcast coverage of Alaska is, of course, inadequate on an area basis, this limitation is presently imposed by economic considerations (the sparseness of population with respect to the area of the State), rather than by any scarcity in available standard broadcast spectrum space, and the restrictions which accordingly are imposed are only those intended to limit interstation interference and insure that each new assignment will contribute efficiently to the improvement in broadcast service. Hawaii and Guam are both limited in geographical extent, and so isolated from other populated areas that standard broadcast stations can be assigned with only a limited need to consider interference effects external to the particular State or territory. We see no need to apply any more restrictive rules in these cases than with respect to Alaska. While the availability of standard broadcast service in Puerto Rico and the Virgin Islands is limited primarily by their proximity to Cuba, where many stations operate, and to Haiti and the Dominican Republic, this limitation is not sufficient to preclude adequate coverage of these comparatively small islands by standard broadcast facilities assigned to the communities therein, and we do not feel justified in imposing the more restrictive standards of the new rules to these territories. While the distances of these outlying States and territories from the conterminous States vary greatly, all are sufficiently far away that assignment policies which place relatively few obstacles in the way of new daytime and unlimited time standard broadcast assignments in these areas can have little preclusionary effect on assignments in the conterminous States.

75. Having extracted the useful substance of Note 2 to § 1.571, as above described, we are deleting this note, thereby, in effect, lifting the "freeze" on the filing of certain categories of applications.

76. When an applicant relies on a demonstration that the existing aural service to the community which he serves or proposes to serve is inadequate as a basis for the acceptance of his application, it should be evident that his application, to be eligible for a grant without hearing, must propose an operation that itself will provide an adequate service to the community. As is well known, the Commission consistently requires that a new standard broadcast station provide an interference-free signal of 5 mv./m. or greater over the entire community to which it is assigned. This longstanding requirement is presently not stated directly in the rules, but may be derived from § 73.188(b)(2), which requires that the transmitter site for a proposed station be so selected that a signal of 5 mv./m. minimum strength will be delivered over the most distant residential section of the designated community, read in connection with the textual material of § 73.182(f) which makes it clear that service is considered to be provided only when the signal is interference-free, which, at night, may require a signal in excess of the 5 mv./m. minimum. Since this requirement bears an important relationship to the application of the new rules, we consider it desirable that it be stated clearly and directly, and we have included it, together with the concomitant requirement for a 25 mv./m. signal over business areas of the community in a new paragraph added to § 73.24, a section of the rules which specifies the showings which must be made prerequisite to the authorization of a new station or an increase in the

facilities of an existing station. It is recognized that, in the individual case, an existing station proposing an increase in power within the power ceiling imposed on the class of station involved, or because of interference considerations, may be unable to meet fully the service requirements discussed above. In such an instance, if the proposed operation would provide service to the community substantially superior to that provided by the existing operation, and is otherwise in compliance with the rules, the Commission will give favorable consideration to a request for waiver of the community service requirement.

77. During the year following adoption of the current AM rules in 1964, over 400 major applications were filed. This total was due in part to pent-up demand created by the "freeze" period preceding adoption of the rules. Due to this large influx and the complex nature of the studies required under the "go-no go" system, a large blacklog soon developed. As the average length of time to dispose of applications grew, so did the necessity to amend and up-date them. Consequently, the backlog tended to become self-perpetuating. Because of a reduction in personnel available to process AM applications, the filing of new proposals in numbers even approaching the total filed subsequent to the lifting of the last "freeze" will result inevitably in another large backlog. Thus steps may be necessary to control the influx of applications. Considerable thought has been given to the design of an acceptable method to accomplish this result. We have concluded, however, that it would be premature to institute control measures at the outset, when we are unable to predict accurately the rate of incoming applications. Accordingly, at this time, no restrictions will be placed on the potential number of proposals which may be filed. If the number submitted, however, becomes administratively burdensome, we will give further consideration to the imposition of control measures. These measures will probably involve the declaration of periodic "open" and "closed" seasons for the filing of applications. If it becomes necessary to institute such measures, they will be temporary in nature, and advance notice will be given, so that all parties will have ample time to complete and submit any applications which are in preparation.

78. The amendments to the rules, as discussed herein, are set forth below. The additional requirements will apply to all applications filed after the effective date of these rules.

79. *Accordingly, it is ordered.* That, effective April 10, 1973, Part 73 of the rules and regulations is amended as set forth below. Authority for this action is found in sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

80. *It is further ordered,* That this proceeding is terminated.

(Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

Adopted: February 21, 1973.

Released: February 28, 1973.

FEDERAL COMMUNICATIONS COMMISSION,[33]

[SEAL] BEN F. WAPLE, *Secretary.*

1. Section 1.571 is amended by redesignating Note 1 as Note and amending the text, and deleting Note 2 to read as follows:

§ 1.571 Processing of standard broadcast applications.

* * * * *

NOTE: No application for broadcast facilities in the conterminous United States tendered for filing after July 13, 1964, will be accepted for filing unless it complies fully with the provisions of § 73.24(b) and § 73.37 (a) of this chapter through (d) of this chapter, and no application for broadcast facilities in the conterminous United States tendered for filing after July 18, 1968, will be accepted for filing unless it complies fully with the provisions of § 73.24(b) of this chapter and the provisions of § 73.37(a) through (e) of this chapter. No application for new or changed broadcast facilities in the States of Alaska, and Hawaii, the Commonwealth of Puerto Rico, and the territories of the Virgin Islands, Guam, and American Samoa, tendered for filing after July 18, 1968, will be accepted for filing unless it complies fully with the provisions of §§ 73.24(b) and 73.37(a) through (f) of this chapter.

2. In § 73.24, paragraph (b) and Note are amended, present paragraph (j) becomes paragraph (k) and a new paragraph (j) is added to read as follows:

§ 73.24 Broadcast facilities, showings required.

* * * * *

(b) That a proposed new station (or a proposed change in the facilities of an authorized station) complies with the pertinent requirements of § 73.37 of this chapter.

NOTE: The provisions of § 73.37 of this chapter shall not be applicable to new Class II–A stations or to stations for which applications were accepted for filing before July 13, 1964. With respect to such stations, the provisions of § 73.28(d) of this chapter, and the provisions of NOTE 1 of § 73.37 of this chapter shall apply. Special provisions concerning interference from Class II–A to stations of other classes authorized after October 30, 1961, are contained in § 73.22(d) of this chapter and NOTE 3 to § 73.21 of this chapter. The level of interference shall be computed pursuant to §§ 73.182 and 73.186 of this chapter.

* * * * *

(j) That the 25 mv./m. contour encompasses the business district of the community to which the station is assigned, and that the 5 mv./m. contour (or, at night, the interference-free contour, if of a higher value) encompasses all residential areas of such community.

(k) That the public interest, convenience, and necessity will be served through the operation under the proposed assignment.

§ 73.30 [Amended]

3. Section 73.30 is amended by deleting paragraph (c).

4. In § 73.37, amend the headnote and add new paragraphs (e), (f), and Notes 4, 5, 6, 7, and 8, to read as follows:

§ 73.37 Applications for broadcast facilities, showing required.

* * * * *

(e) In addition to a demonstration of compliance with the requirements of paragraph (a) of this section, and, where appropriate, paragraphs (b), (c), and (d) of this section, an application for a new standard broadcast station, or for a major change (see § 1.571(a)(1) of this chapter) in an authorized standard broadcast station, as a condition for its acceptance, shall make satisfactory showings as indicated below for the kind of application submitted:

(1) Application for a new daytime station, or for a change in the frequency of an existing daytime station:

(i) That at least 25 percent of the area or population which would receive interference-free primary service from the proposed station does not receive such service from an authorized standard broadcast station, or receive service from an authorized FM broadcast station with a signal strength of 1 mv./m., or greater, or

(ii) That no FM channel is available for use in the community designated in the application and that at least 20 percent of the area or population of the community receives less than two daytime aural services. For the purpose of this showing an aural service shall be deemed to be provided by an interference-free groundwave signal from an authorized standard broadcast station of a strength of 5 mv./m., or greater, or by an F (50, 50) signal from an authorized FM broadcast station of a strength of 70 dBu (3.16 mv./m.), or greater.

(2) Application for a new unlimited time station, for a change in the frequency of an authorized unlimited time station, or for nighttime facilities by an authorized daytime station, a satisfactory showing under paragraph (e)(2)(i) of this section (except for a Class IV station), and under either paragraph (e)(2)(ii) or (iii) of this section:

(i) That objectionable interference at night will not result to any authorized station, as determined pursuant to § 73.182(o),

[33] Commissioner Robert E. Lee absent; Commissioner Johnson dissenting and issuing a statement, which is filed as part of the original document; Commissioner Wiley issuing a separate statement, which is also filed as part of the original document.

(ii) That at least 25 percent of the area or population which would receive interference-free primary service at night from the proposed station does not receive such service from an authorized standard broadcast station or service from an authorized FM broadcast station with a signal strength of 1 mv./m., or greater, or

(iii) That no FM channel is available for use in the community designated in the application, and at least 20 percent of the area or population of the community receives less than two nighttime aural services. For the purpose of this showing, an aural service shall be deemed to be provided by an interference-free groundwave signal from an authorized standard broadcast station with a strength of 5 mv./m., or greater, or by an F (50, 50) signal from an authorized FM broadcast station with a strength of 70 dBu (3.16 mv./m.), or greater.

(3) Application by an authorized station (other than a Class IV station) proposing changes in facilities, other than a change in frequency, must make a satisfactory showing, where appropriate, under paragraph (e)(3)(i) of this section, and under either paragraph (e)(3)(ii) or (iii) of this section.

(i) For a change in nighttime facilities, that the proposed change will not result in objectionable interference to other stations as determined pursuant to § 73.182(o).

(ii) For an increase in power, either daytime or nighttime, that the authorized operation, during the portion of the broadcast day for which the power increase is sought, includes less than 80 percent of the area or population of the community to which the station is assigned within its 5 mv./m. groundwave contour (or within its interference-free groundwave contour, if of a higher value), or,

(iii) For an increase in power, that at least 25 percent of the area or population which, as a result of the power increase, for the first time would receive interference-free primary service from the station is without primary service from any other standard broadcast station.

(f) Applications for new or changed facilities in the states of Alaska and Hawaii, in the Commonwealth of Puerto Rico, and in the territories of the Virigin Islands, Guam, and American Samoa will be accepted for filing only if satisfactory showings are submitted with respect to the following:

(1) The proposed operation complies with the requirements of paragraphs (a), (b), (c), and (d) of this section.

(2) Unlimited time operation, by other than a Class IV facility, will not cause objectionable skywave interference at night to an existing station, pursuant to § 73.182(o). In addition, each proposal for unlimited time operation (including Class IV proposals) shall meet at least one of the following conditions:

(i) Not more than 10 percent of the population included within the normally protected nighttime contour would receive objectionable interference.

(ii) The proposed operation would be the first standard broadcast facility assigned to the community which would provide nighttime service.

(iii) For a proposed new station, that at least 25 percent of the area or population included within the nighttime interference-free primary service contour is without nighttime primary standard broadcast service, or, for a proposed change in the nighttime facilities of an authorized station, that at least 25 percent of the area or population which would receive interference-free nighttime primary service from the station for the first time as a result of the change in facilities is without nighttime primary standard broadcast service.

* * * * *

NOTE 4: All applications for new stations, or for major changes in existing stations tendered for filing after July 18, 1968, for facilities in the conterminous United States, shall be subject to the provisions of paragraph (e) of this section, or, for facilities in the States of Alaska and Hawaii, the Commonwealth of Puerto Rico and the territories of the Virgin Islands, Guam, and American Samoa, shall be subject to the provisions of paragraph (f) of this section.

NOTE 5: In making determinations of "aural service" to the community from standard broadcast or FM broadcast stations in showings pursuant to paragraphs (e)(1)(ii) and (e)(2)(iii) of this section, service provided by any standard broadcast station or FM broadcast station whose transmitter site is located more than 50 miles from the nearest boundary of the community designated in the application shall be excluded from consideration.

NOTE 6: No FM channel is available for use in the community (see paragraphs (e)(1)(ii) and (e)(2)(iii) of this section, if no channel is assigned to the community for commercial use in the FM Table of Assignments (§ 73.202(b)), as amended by Commission action as of the date the application is tendered, or, if assigned, is occupied by an authorized facility, and no unoccupied channel can be utilized to serve the community pursuant to § 73.203(b).

NOTE 7: In the determination of the extent of existing aural service to a community, areas and populations of the community receiving service from a standard broadcast station and an FM broadcast station which are commonly owned shall be considered as receiving a single aural service from these stations. Service provided by noncommercial educational FM stations and standard broadcast stations shall not be included in the determination of existing aural service.

NOTE 8: An application for a new unlimited time station, other than a Class IV station, even though including a satisfactory showing pursuant to paragraph (e)(2) of this section will not be accepted for filing if the proposed daytime power is greater than the proposed nighttime power, unless it contains an additional satisfactory showing pursuant to paragraph (e)(1) of this section for daytime hours of operation.

[FR Doc.73-4089 Filed 3-2-73;8:45 am]

Title 49—Transportation

SUBTITLE A—OFFICE OF THE SECRETARY OF TRANSPORTATION

[Docket No. 18, Amt. 21-1]

PART 21—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS OF THE DEPARTMENT OF TRANSPORTATION—EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Obligations of Airport Operators

The purpose of this amendment is to change the reporting date in Appendix C(b)(3) of Part 21 of the regulations of the Secretary of Transportation from January 31 of each year to March 31 of each year for the submission of the required data.

The data, submitted pursuant to Appendix C(b)(3), requires information from federally assisted airport operators and their concessionaires that is nearly identical to the information required by the Equal Employment Opportunity Commission in Form EEO-1 which is required to be filed by March 31 of each year (29 CFR 1602.7). In order to relieve those who are required to file both forms from duplicating the effort of compiling the information, the Department of Transportation is changing its reporting date to coincide with that of the Equal Employment Opportunity Commission.

Because this amendment does not impose an additional burden on those affected by the reporting requirement, I find that public notice and procedure thereon are not necessary, and that it may become effective in less than 30 days.

In consideration of the foregoing, the last sentence of Appendix C(b)(3) of Part 21 of the regulations of the Secretary of Transportation is hereby amended, effective February 23, 1973, to read as follows:

(b) *Obligations of the airport operator*—* * *

(3) *Reports.* * * * Each airport operator shall, by March 31 of each year, submit to the area manager of the FAA area in which the airport is located a report for the preceding year in a form prescribed by the Federal Aviation Administrator.

Issued in Washington, D.C., on February 23, 1973.

CLAUDE S. BRINEGAR,
Secretary of Transportation.

[FR Doc.73-4074 Filed 3-2-73;8:45 am]

CHAPTER X—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER A—GENERAL RULES AND REGULATIONS

PART 1002—FEES

Services Performed in Connection With Licensing and Related Services; Correction

FEBRUARY 28, 1973.

Section 1002.2, Title 49, Code of Federal Regulations (36 FR 11294, June 11, 1971) is corrected by adding the fee of

$35 in the right hand column of paragraph (d) (40) as follows:

§ 1002.2 Filing fees.

* * * * *

(d) *Schedule of filing fees.*

* * * * *

(40) A petition for waiver of any provision of the lease and interchange regulations, 49 CFR Part 1057	35

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[SEAL] ROBERT L. OSWALD, *Secretary.*

[FR Doc.73-4132 Filed 3-2-73;8:45 am]

[S.O. 1086; Amdt. 3]

PART 1033—CAR SERVICE

Chicago, Rock Island and Pacific Railroad Co.

At a session of the Interstate Commerce Commission, Railroad Service Board, held in Washington, D.C., on the 26th day of February 1973.

Upon further consideration of Service Order No. 1086 (36 FR 25425, 37 FR 12727, and 38 FR 877), and good cause appearing therefor:

It is ordered, That:

Section 1033.1086 *Service Order No. 1086* (Chicago, Rock Island and Pacific Railroad Co. authorized to operate over tracks of the Peoria and Pekin Union Railway Co.) be, and it is hereby, amended by substituting the following paragraph (e) for paragraph (e) thereof:

(e) *Expiration date.* This order shall expire at 11:59 p.m., August 31, 1973, unless otherwise modified, changed, or suspended by order of this Commission.

Effective date. This amendment shall become effective at 11:59 p.m., February 28, 1973.

(Secs. 1, 12, 15, and 17(2), 24 Stat. 379, 383, 384, as amended; 49 U.S.C. 1, 12, 15, and 17(2). Interprets or applies Secs. 1(10-17), 15(4), and 17(2), 40 Stat. 101, as amended, 54 Stat. 911; 49 U.S.C. 1(10-17), 15(4), and 17(2))

It is further ordered, That a copy of this amendment shall be served upon the Association of American Railroads, Car Service Division, as agent of all railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the American Short Line Railroad Association; and that notice of this amendment be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Office of the Federal Register.

By the Commission, Railroad Service Board.

[SEAL] ROBERT L. OSWALD, *Secretary.*

[FR Doc.73-4131 Filed 3-2-73;8:45 am]

[S.O. 1087; Amdt. 3]

PART 1033—CAR SERVICE

Burlington Northern Inc.

At a session of the Interstate Commerce Commission, Railroad Service Board, held in Washington, D.C., on the 26th day of February 1973.

Upon further consideration of Service Order No. 1087 (36 FR 25425, 37 FR 12497, and 38 FR 877), and good cause appearing therefor:

It is ordered, That:

§ 1033.1087 *Service Order No. 1087* (Burlington Northern Inc. authorized to operate over tracks of the Peoria and Pekin Union Railway Co.) be, and it is hereby, amended by substituting the following paragraph (e) for paragraph (e) thereof:

(e) *Expiration date.* This order shall expire at 11:59 p.m., August 31, 1973, unless otherwise modified, changed, or suspended by order of this Commission.

Effective date. This amendment shall become effective at 11:59 p.m., February 28, 1973.

(Secs. 1, 12, 15, and 17(2), 24 Stat. 379, 383, 384, as amended; 49 U.S.C. 1, 12, 15, and 17(2). Interprets or applies secs. 1(10-17), 15(4), and 17(2), 40 Stat. 101, as amended, 54 Stat. 911; 49 U.S.C. 1(10-17), 15(4), and 17(2))

It is further ordered, That a copy of this amendment shall be served upon the Association of American Railroads, Car Service Division, as agent of all railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the American Short Line Railroad Association; and that notice of this order be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Office of the Federal Register.

By the Commission, Railroad Service Board.

[SEAL] ROBERT L. OSWALD, *Secretary.*

[FR Doc.73-4130 Filed 3-2-73;8:45 am]

[S.O. 1107; Amdt. 2]

PART 1033—CAR SERVICE

Lehigh Valley Railroad Co.

At a session of the Interstate Commerce Commission, Railroad Service Board, held in Washington, D.C., on the 26th day of February 1973.

Upon further consideration of Service Order No. 1107 (37 FR 16549 and 25236), and good cause appearing therefor:

It is ordered, That:

§ 1033.1107 *Service Order 1107* (Lehigh Valley Railroad Co., John F. Nash and Richard C. Haldeman, Trustees, authorized to operate over tracks of Penn Central Transportation Co., George P. Baker, Richard C. Bond, and Jervis Langdon, Jr., Trustees) be, and it is hereby, amended by substituting the following paragraph (e) for paragraph (e) thereof:

(e) *Expiration date.* The provisions of this order shall expire at 11:59 p.m., June 30, 1973, unless otherwise modified, changed or suspended by order of this Commission.

Effective date. This amendment shall become effective at 11:59 p.m., February 28, 1973.

(Secs. 1, 12, 15, and 17(2), 24 Stat. 379, 383, 384, as amended; 49 U.S.C. 1, 12, 15, and 17(2). Interprets or applies secs. 1(10-17), 15(4), and 17(2), 40 Stat. 101, as amended, 54 Stat. 911; 49 U.S.C. 1(10-17), 15(4), and 17(2).)

It is further ordered, That a copy of this amendment shall be served upon the Association of American Railroads, Car Service Division, as agent of all railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the American Short Line Railroad Association; and that notice of this amendment be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Office of the Federal Register.

By the Commission, Railroad Service Board.

[SEAL] ROBERT L. OSWALD, *Secretary.*

[FR Doc.73-4129 Filed 3-2-73;8:45 am]

[Rev. S.O. 1108; Amdt. 1]

PART 1033—CAR SERVICE

Reading Co.

At a session of the Interstate Commerce Commission, Railroad Service Board, held in Washington, D.C., on the 26th day of February 1973.

Upon further consideration of Revised Service Order No. 1108 (37 FR 28634), and good cause appearing therefor:

It is ordered, That:

§ 1033.1108 *Rev. Service Order No. 1108* (Reading Co., Richardson Dilworth and Andrew L. Lewis, Jr., Trustees, authorized to operate over tracks of Lehigh Valley Railroad Co., John F. Nash and Robert C. Haldeman, Trustees) be, and it is hereby, amended by substituting the following paragraph (e) for paragraph (e) thereof:

(e) *Expiration date.* The provisions of this order shall expire at 11:59 p.m., August 31, 1973, unless otherwise modified, changed, or suspended by order of this Commission.

Effective date. This amendment shall become effective at 11:59 p.m., February 28, 1973.

(Secs. 1, 12, 15, and 17(2), 24 Stat. 379, 383, 384, as amended; 49 U.S.C. 1, 12, 15, and 17(2). Interprets or applies secs. 1(10-17), 15(4), and 17(2), 40 Stat. 101, as amended, 54 Stat. 911; 49 U.S.C. 1(10-17), 15(4), and 17(2))

It is further ordered, That a copy of this amendment shall be served upon the Association of American Railroads, Car Service Division, as agent of all railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the American Short Line Railroad Association; and that notice of this amendment be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Office of the Federal Register.